(22,230)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 81.

GRAND TRUNK WESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF SOUTH BEND ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

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1 STATE OF INDIANA:

In The Supreme Court.

Be it remembered that heretofore towit: on the 16th day of January, 1907, the same being the 45th Judicial day of the November Term, 1906, of said Supreme Court, the Grand Trunk Western Railway Company by its attorneys, Kretzinger, Gallagher, Rooney and Rogers, and Anderson, Parker and Crabill, filed in the office of the Clerk of said Supreme Court said State of Indiana a transcript of the record and proceedings had in the Laporte Circuit Court of said State of Indiana in a cause wherein the Grand Trunk Western Railway Company was the appellant, and the City of South Bend, et al., were the appellees, together with an assignment of errors by appellant and a joinder in error and waiver of notice by the appellees' attorneys, Frank Dunnahoo, and Hubbard and Hubbard.

2 STATE OF INDIANA:

In the Supreme Court.

GRAND TRUNK WESTERN RAILWAY COMPANY, Appellant.

vs.

THE CITY OF SOUTH BEND, EDWARD FOGARTY, PIETR KOCZROWSKI, James H. Loughman, Hugh T. Montgomery, Henry F. Elbel, John C. Schreyer, August Steuckle, George Whitman, Leo M. Kucharski, Michael J. Somers, Henry Hartzer; the Board of Public Works of the City of South Bend; William A. McInerny, John W. Papczynski, Edwin F. Nicar; James L. McWeeney, Appellees.

Appeal from the Laporte Circuit Court.

Filed Jan. 16, 1907 Edward V. Fitzpatrick, Clerk.

Assignment of Errors.

The appellant says that there is manifest error in this cause in this namely:

1. The Court erred in sustaining the demurrer of the city of South Bend to the first paragraph of the amended complaint.
2. The Court erred in sustaining the demurrer of the city of South Bend to the second paragraph of the amended complaint.
3. The Court erred in sustaining the demurrer of Edward Fogarty to the first paragraph of the amended complaint.
4. The Court erred in sustaining the demurrer of Edward Fogarty to the second paragraph of the amended complaint.
5. The Court erred in sustaining the demurrer of Pietr Koczrowski to the first paragraph of the amended complaint.

6. The Court erred in sustaining the demurrer of Pietr Koczrowski to the second paragraph of the amended complaint.

7. The Court erred in sustaining the demurrer of James H. Loughman to the first paragraph of the amended complaint.

8. The court erred in sustaining the demurrer of James H. Loughman to the second paragraph of the amended complaint.

9. The Court erred in sustaining the demurrer of Hugh T. Montgomery to the first paragraph of the amended complaint.

10. The Court erred in sustaining the demurrer of Hugh T. Montgomery to the second paragraph of the amended complaint.

11. The Court erred in sustaining the demurrer of Henry F. Elbel to the first paragraph of the amended complaint.

3 12. The Court erred in sustaining the demurrer of Henry F. Elbel to the second paragraph of the amended complaint.

13. The Court erred in sustaining the demurrer of John C. Schreyer to the first paragraph of the amended complaint.

14. The Court erred in sustaining the demurrer of John C. Schreyer to the second paragraph of the amended complaint.

15. The court erred in sustaining the demurrer of August Steuckle to the first paragraph of the amended complaint.

16. The Court erred in sustaining the demurrer of August Stecukle to the second paragraph of the amended complaint.

17. The Court erred in sustaining the demurrer of George Whitman to the first paragraph of the amended complaint.

18. The Court erred in sustaining the demurrer of George Whiteman to the second paragraph of the amended complaint.

19. The Court erred in sustaining the demurrer of Leo. M. Kucharski to the first paragraph of the amended complaint.

20. The Court erred in sustaining the demurrer of Leo. M. Kucharski to the second paragraph of the amended complaint.

21. The Court erred in sustaining the demurrer of Michael J. Somers to the first paragraph of the amended complaint.

22. The Court erred in sustaining the demurrer of Michael J. Somers to the second paragraph of the amended complaint.

23. The Court erred in sustaining the demurrer of Henry Hartzer to the first paragraph of the amended complaint.

24. The Court erred in sustaining the demurrer of Henry Hartzer to the second paragraph of the amended complaint.

25. The Court erred in sustaining the demurrer of The Board of Public Works of the City of South Bend to the first paragraph of the amended complaint.

26. The Court erred in sustaining the demurrer of The Board of Public Works of the city of South Bend to the second paragraph of the amended complaint.

27. The Court erred in sustaining the demurrer of William A. McInerny to the first paragraph of the amended complaint.

28. The Court erred in sustaining the demurrer of William A. McInerny to the second paragraph of the amended complaint.

29. The Court erred in sustaining the demurrer of John W. Papczynski to the first paragraph of the amended complaint.

30. The Court erred in sustaining the demurrer of John W. Papczynski to the second paragraph of the amended complaint.

31. The Court erred in sustaining the demurrer of Edwin F. Nicar to the first paragraph of the amended complaint.

32. The Court erred in sustaining the demurrer of Edwin F. Nicar to the second paragraph of the amended complaint.

4 33. The Court erred in sustaining the demurrer of James L. McWeeney to the first paragraph of the amended complaint.

34. The Court erred in sustaining the demurrer of James L. McWeeney to the second paragraph of the amended complaint.

Wherefore, the appellant prays that the judgment be reversed.

KRETZINGER, GALLAGHER, ROONEY & ROGERS.
ANDERSON, PARKER & CRABILL,
Attorneys for Appellant.

Filed Jan. 16 1907 Edward V. Fitzpatrick, Clerk.

Joinder in Error.

The appellees herein now waive notice of appeal and appearing to this appeal say that there is no error in the record as alleged by appellant.

FRANK DUNNAHOO,
HUBBARD & HUBBARD,
Attorneys for Appellees.

Filed Jan. 16 1907 Edward V. Fitzpatrick, Clerk.

5 Pleas and proceedings before the Honorable John C. Richter, Judge within and for the Thirty-second Judicial Circuit of the State of Indiana, and Ex-officio Judge of the Laporte Circuit Court, at a term of said court held at the court-house in the city of Laporte, county of Laporte and State of Indiana, commencing on Monday the 26th. day of September, 1903.

STATE OF INDIANA,
Laporte County:

In the Laporte Circuit Court, September Term, 1903.

Title.

THE GRAND TRUNK WESTERN RAILWAY COMPANY,
vs.
THE CITY OF SOUTH BEND, EDWARD FOGARTY, PIETR KOCZROWSKI, James H. Loughman, Hugh T. Montgomery, Henry F. Elbel, John C. Schreyer, August Steuckle, George Whiteman, Leo M. Kucharski, Michael J. Somers, Henry Hartzer; The Board of Public Works of the City of South Bend; William A. McInerny, John W. Papczynski, Edwin F. Nicar, James L. McWeeney.

Be it remembered that on the 6th day of October, 1903, the same being the 8th juridical day of the September Term, 1903, of said

Court, the following proceedings were had in the above entitled cause, to-wit:

THE GRAND TRUNK WESTERN RY. CO.
vs.
THE CITY OF SOUTH BEND et al.

Now comes the plaintiff herein by counsel and files its amended complaint in two paragraphs, in these words, to-wit:

6 STATE OF INDIANA,
Laporte County, ss:

In the Laporte Circuit Court, September Term, 1902.

THE GRAND TRUNK WESTERN RAILWAY COMPANY, Plaintiff,
vs.
THE CITY OF SOUTH BEND, EDWARD FOGARTY, PIETR KOCZROWSKI, James H. Loughman, Hugh T. Montgomery, Henry F. Elbel, John C. Schreyer, August Steuckle, George Whiteman, Leo M. Kucharski, Michael J. Somers, Henry Hartzer; the Board of Public Works of the City of South Bend; William A. McInerny, John W. Papczynski, Edwin F. Nicar, James L. McWeeney, Defendants.

Complaint.

Amended Complaint.

The above named plaintiff complains of the above named defendants and says:

1. That the plaintiff is a railroad company duly organized as a corporation under the laws of the State of Indiana and duly authorized to and now is operating a certain railroad extending from the city of Port Huron in the State of Michigan to Chicago in the State of Illinois, which said railroad is the same railroad formerly known as that of the peninsular Railroad Company, and passes through the city of South Bend in the state of Indiana, and has existed as such corporation since the 10th day of December, 1866.

2. That the city of South Bend is a municipal corporation duly organized under the laws of the State of Indiana; that the said dedendant Fogarty is the mayor of said city; that the defendants, Koczrowski, Loughman, Montgomery, Elbel, Schreyer, Stecukle, Whiteman, Kucharski, Somers and Hartzer are members of the common council of said city; that the defendants McInerny, Papczynski and Nicar are members of and constitute the Board
7 of Public Works of said city; That the defendant McWeeney is the chief of the Police Force of said city.

3. That on or about the 24th day of October, 1866, the city of South Bend by William G. George, Mayor; Thomas S. Stanfield; William G. George, Adoniram B. Judson, Clement Studebaker,

George Milburn, John Niles, Robert Montgomery, Adolphus Eberhart, William Miller, Esq., John Brownfield, Charles W. Guthrie, John A. Hendricks, John T. Lindsey and John H. Keedy duly signed and executed articles of association, whereby they agreed to incorporate themselves together for the purpose of building, owning and operating a railroad from the north line of the State of Indiana in Township Thirty eight North, Range Four East, in St. Joseph Co[illegible] thence running southwesterly by way of Mishawaka, and throu[illegible] South Bend, and thence southwesterly and westerly through St. Joseph, Laporte, Porter and Lake Counties to the west line of the State of Indiana in the direction of Chicago in the State of Illinois, said proposed road to be about Eighty five miles long. Said articles of association were filed in the office of the secretary of the State of Indiana on the 10th day of December, 1866. In said articles of association it was stated that the capital stock of said company should be One Million Dollars; That there should be thirteen directors who were named therein, and the name of the company should be Peninsula Railroad Company, and the City of South Bend subscribed for and took and held Fifty Thousand Dollars of the capital stock of said railroad company.

4. That on the 2nd day of March, 1868, the common council of the City of South Bend duly passed and enacted an ordinance numbered 62, whereby it was ordained that the Peninsula Railroad Company of Indiana was and should be authorized to construct and maintain a track for its said railroad within the city of South Bend upon the following terms, towit:

Commencing at the eastern limits of said city on the east end of a Twenty foot Street laid out and dedicated on the south side
8 of Samuel G. Cottrell's Addition to the town of Lowell, or at any point on said Twenty foot street that the company might see proper to adopt; "Thence across the St. Joseph River to the eastern end of the extension of Division Street and its extension in said city so far west as the said company may desire, crossing all intermediate streets and alleys, and to run locomotive cars and trains over said road so far as might be necessary for the conducting of the business of said company." That it was further provided in said ordinance that the right of said company to locate their road through the city of South Bend should be subject to the conditions and terms, following, towit:

1st Par. Amended Complaint.

1st. The grant should not be construed to interfere with the private rights of the owners of real estate over which said road might be located, relative to damages for such occupancy and appropriation, but was made subject thereto.

2nd. That when the road crossed any street or alley it should be made to conform to the grade of such street or alley, unless the common council should consent to a variation of such grade.

3rd. That at the crossing of streets and alleys the company should lay its tracks in such manner as to cause as little obstruction as

possible to the use of such streets and alleys for the passage of wagons and other vehicles, and should plank its track between the rails and within at least six feet of each side of said rails at all such crossings the entire width of said street or alley, and should also plank or gravel the side walk where they might cross said railroad, and should also make said crossing safe, and convenient for the passage of persons and vehicles, and should keep said crossing when so made in good repair so long as they should use the streets and alleys for the purposes aforesaid.

4th. That the company should construct and keep in repair under and on the line of said road at such points as might be deemed necessary by the city engineer, sufficient culverts and drains to admit of the free passage of water along the streets which might be affected by the construction of said railroad.

5th. That in the event of the failure of the railroad to do the said acts and things so required to be done, and in case the said company should fail to put such crossing in the order above required to be done, or to keep the same in repair and to construct and keep in repair such culverts, that then the same should be done by the Street Commissioner of said city under directions of the common council, and the city should collect the costs of the same by suit at law.

6th. It was further provided in said ordinance that the company should not permit cars or locomotives to stand at street or alley crossings so as to obstruct the free passage of teams, vehicles or persons, without danger or inconvenience, and should, when a train was going out or coming in, rings its engine bell so as to give notice of arrival or departure, nor should it run any locomotives or cars on said railroad at a faster rate than five miles an hour between Chapin and Michigan streets within the limits of said city, under a penalty of ten Dollars for each offense.

5. It was further provided in said ordinance that no more than one track for such road should be laid across any street of said city without the previous assent of the common council of said city, except only the privilege which it is stated "Is hereby granted to lay down a double track across the bridge over the St. Joseph River, and from the western terminus of said bridge to General Taylor Street in said city, subject to the conditions herein before contained," and subject also to the provisions that said company should and would indemnify the city and hold it harmless and free from all damages or costs for the bridging of the said river within the jurisdiction of said city.

6. That the corporation described and referred to in said ordinance was the same corporation which was incorporated as herein before stated and was generally known and described as the Peninsula Railroad Company.

7. That the Peninsula Railroad abandoned its said road and failed to expend the sum of Fifty Thousand Dollars on its line within two years from March 11, 1867 whereby, by reason of an act to declare abandon- certain unfinished railroads and to provide for their completion and to declare forfeited the franchises of certain railroad

companies, and for the assessment of the value thereof, and for the organization of new companies and for making annual statements, approved March 11, 1867, the said company forfeited its rights, and privileges, and therefore, for the purpose of completing said abandoned road and being invested with all the rights, privileges and immunities formerly held by the said Peninsula Railroad Company, Thomas S. Stanfield, the City of South Bend, St. Joseph Iron Company, Judson, Montgomery & Company, Clark & Judson A. Eberhart & Company, H. E. and L. W. Martin, William W. Butterworth, Q. A. Adams, George Milburn and Company, the city of Valparaiso and fourteen others did, on the 6th day of October, 1869, organize and associate themselves as a corporation for the purpose of completing said railroad, and did thereby become a corporation under the name of the Peninsula Railroad Company, with a capital stock of $500,000.00, and the defendant the City of South Bend subscribed for and took and paid for $50,000.00 of said capital stock, which said articles of association were filed with the secretary of state of the State of Indiana on the 14th day of October, 1869. And the said Peninsula Railroad Company last mentioned did thereupon proceed to cause the value of the rights, privileges, interests, rights of way, franchises, properties, and immunities of said first named company to be ascertained in manner following, that is to say: That three disinterested free holders resident in St. Joseph County were selected as appraisers; that one was selected by said new company and one by the old company, and one by the Auditor of said
11 county, and that the said freeholders so elected did constistute a board of appraisers, and did proceed to put a valuation on all of said rights, privileges, interests, rights of way, franchises, properties and immunities and before making said appraisement the said board of appraisers did take an oath faithfully to discharge their duties and to make a true and impartial appraisement of such rights, franchises, interests, rights of way properties and immunities; and that said board did report their appraisement to the auditor of St. Joseph County and the said new Peninsular Company did pay the amount of said appraisement to the treasurer of St. Joseph County.

And plaintiff avers that the said new Peninsula Railroad Company did fulfill and perform all the requirements and provisions and do everything that was required to be done by said new company under the statute aforesaid in order to enable it, the said new Peninsular Railroad Company, to take, appropriate and hold all of the said rights, privileges, franchises, rights of way, interests, properties and immunities of the said Peninsula Railroad Company.

And plaintiff avers that thereupon the said first named Peninsula Railroad Company did assent to said act of appropriation by said new company and did surrender and deliver to said new company the possession of all its property, and did permit and allow the said new company to take possession of, have, hold, own and control all of said rights, privileges, franchises, property, rights of way and immunities of said first mentioned company, and the said new company with the consent and approbation of the said city of South

Bend, did thereupon take possession of the right of way and of all of the property of the said first mentioned company, including the rights granted by the said ordinance of March 2, 1868.

8. That thereafter, to-wit: on or about the 1st day of May, 1870, the said Peninsula Railroad Company, under and in accordance with the statutes of the State of Indiana, did unite and con-
12 solidate with two other railroads, namely: The Peninsular Railroad Company of Michigan and the Peninsular Railroad Company of Illinois, and did agree to consolidate and unite each and all of said companies into a single corporation, thereby forming the Peninsular Railway Company, for the purpose of building and completing said railroad on the line herein before mentioned, and that thereby the said Peninsular Railway Company became entitled to all the property, rights and franchises of the said Peninsular Railroad Company of the State of Indiana, and of its several constituent corporations; that at the time of said consolidation the proposed railroad of said Peninsular Railroad Company met and joined the lines of road of said two other companies at the north and west lines of the State of Indiana and formed one continuous line; that thereupon the said Peninsular Railway Company entered on and took possession of all of the railroad and other property of said Peninsular Railroad of Indiana.

9. That by a certain mortgage, dated May 1, 1870, the said Peninsular Railway Company did mortgage its said railroad to the Union Trust Company of New York.

10. That by a certain agreement of consolidation, dated April 18, 1873, the said Peninsular Railway Company and a certain other railway company known as the Port Huron and Lake Michigan Company, did unite, and thereby form a new corporation known as the Chicago and Lake Huron Railroad Company, by which consolidation the Chicago and Lake Huron Railroad Company succeeded to and at once took possession of all the property, rights, powers, privileges and franchises and became the owner of the said railroad. That at the time of such consolidation the said Peninsular Railroad Company extended over and along the line of, and was the said Peninsular Railroad through St. Joseph County, Indiana, and connected with Port Huron and Lake Michigan Railroad, at Lansing, Michigan, forming one continuous line.

13 11. That afterwards the said Union Trust Company of New York brought suit against the Chicago and Lake Huron Railway and others to foreclose the last mentioned mortgage in the Circuit Court of the United States of the District of Indiana, and such proceedings were had that on or about the 29th day of September, 1879, a decree was rendered foreclosing said mortgage, and on February 7, 1880, William P. Fishback, a Commissioner of said Court, by virtue of said decree and an order of sale issued thereon, sold and conveyed all of said railroad in the State of Indiana, being that formerly owned by said Peninsular Railway Company and hereinbefore described, to Joseph Hickson, E. W. Meddaugh, Henry W. Smithers and William F. Whitehouse, conveying to the said purchasers all of the rights, privileges and franchises of said Chicago and Lake Huron Railroad Company.

12. That on the sixth day of January, 1880, the above named purchasers and others associated with them, executed certain articles of association, whereby they associated and duly organized as a corporation under the name of the Indiana Railway Company under and in accordance with the laws of the State of Indiana, for the purpose of operating said railroad and said articles of association were thereafter to wit: on the 17th day of January, 1880, duly filed in the office of the Secretary of State of the State of Indiana.

13. That afterwards, to wit: on the 10th day of March, 1880, the said Joseph Hickson, Elijah W. Meddaugh, Henry W. Smithers, and William F. Whitehouse did execute and deliver to the said Indiana Railway Company a deed of conveyance, conveying to the Indiana Railway Company so much of said railroad as was located in the State of Indiana, together with all the rights, franchises and privileges held by said purchasers.

14. And plaintiff avers that afterwards, to wit: on the 7th day of January, 1880, the said Indiana Railway Company by articles of agreement made between said company and the Northwestern Grand Trunk Railway Company in Illinois and Indiana:
14 The Michigan Railway Company, the Chicago and North Eastern Railroad Company; and the Northwestern Grand Trunk Railway Co. in Michigan, the same having connected lines of railroad did consolidate and unite said corporations, and form a new railroad company by the name of Chicago and Grand Trunk Railway Company, whereby the said Chicago and Grand Trunk Railway Company became the owner of and took possession of all of said railroads and all of the rights, privileges and franchises of the said several railroad companies herein before mentioned, which said railroad- form a continuous line from the city of Port Huron Michigan to the city of Chicago, Illinois including the railroad of the Peninsular Railway Company above described.

15. And plaintiff avers that afterwards the said Chicago and Grand Trunk Railway Company executed and delivered to certain trustees a certain mortgage on its said railroad, and afterwards, on the 17th day of September, 1900, in a suit then pending in the Circuit Court of the United States for the District of Indiana, between the Mercantile Trust Company, of New York, which was complainant, and the Chicago and Grand Trunk Railway Company and others, which were defendants, a decree was rendered by said court foreclosing said certain mortgage executed and delivered by Chicago and Grand Trunk Railway Company, and the said railroad of the said Chicago and Grand Trunk Railway Company, with all its rights, privileges, and franchises, was ordered to be sold, and an order of sale was issued on said decree, and one Walter S. Harshaw, Commissioner of the United States Circuit Court, by order of the said Court, did sell and convey to Charles M. Hayes and Elijah W. Meddaugh all of the said railroad with its rights, franchises and other property lying in the State of Indiana, and did as such Commissioner execute and deliver to the said Charles M. Hays and Elijah W. Meddaugh a deed of conveyance conveying to them all of said

railroad, with its franchises, lying and being in the State of Indiana.

15 16. That afterwards, towit: On or about the 19th day of November, 1900, the said Charles M. Hays and Elijah W. Meddaugh together with other persons who were associated with them, entered into articles of association whereby they duly formed under the Statutes of this State a corporation under the name of the Indiana and Illinois Railway Company for the purpose of operating said railroads, which said articles of association were duly filed in the office of the Secretary of State of the State of Indiana.

17. That afterwards, towit: on the 20th day of November 1900, the said Charles M. Hays and Elijah W. Meddaugh did execute and deliver to the Indiana and Illinois Railway Company a certain deed of conveyance whereby they did convey to the said Indiana and Illinois Railway Company all of the said railroad track formerly belonging to the Chicago and Grank Trunk Railway Company together with all its rights and franchises.

18. That afterwards, towit: On the 20th day of November 1900, an agreement was entered into by and between the Port Huron and Indiana Railway Company, and the said Indiana and Illinois Railway Company, the first named company, being incorporated under and by virtue of the laws of the State of Michigan and extending from the city of Port Huron, Michigan, to a point in the northerly line of the State of Indiana where it met and joined the railway of said Indiana and Illinois Railway Company, whereby the said Port Huron and Indiana Railway Company and the said Indiana and Illinois Railway Company did consolidate and become one railroad company under the name of the Grand Trunk Western Railway Company, this plaintiff, and the said agreement and said articles of consolidation were duly filed with the Secretary of State of the State of Indiana. Whereby the said plaintiff became the owner and took possession of all of said railroad so situate in St. Joseph County in the State of Indiana and entitled to all the rights, privileges and franchises of said Peninsular Railway Company.

16 19. And plaintiff avers that the said Peninsul*ra* Railway company in the year of 1871, relying on the full force of the ordinance of defendant's city, above mentioned, did build its said railroad through St. Joseph County in the State of Indiana, and did build a single track through Division street in the city of South Bend, and in so doing did lay a single track of rails on Division street in the city of South Bend from the west end of the bridge crossing the St. Joseph River in said city, and did expend its tracks therefrom to the west side of Laurel Street in said city, and that said tracks *was* laid in the center of said street, and southwesterly from said Laurel street to the west side of said county, and that the said Peninsular Railway Company and its successors hereinbefore mentioned, each relying likewise on the full force of said ordinance, have ever since kept up and maintained and operated the same as a railroad, and that this plaintiff is now operating the same as a railroad, and as a part of its continuous lines.

20. And plaintiff avers that in the year of 1881 the said Chicago

and Grand Trunk Railway Company, which company was then operating and maintaining said railroad, desired to acquire and perfect its title to the land used by it, and which it would be necessary to use in operating its road, as a right of way through Division Street in said city, and to settle with and compensate the owners of said land for their interest in the central portion of the street so taken, used and occupied or to be thereafter used and occupied by said Railway Company, and relying on the validity of said franchise and right to occupy said street, so granted by the said common council of the City of South Bend on March 2, 1868, did, in accordance with the statutes of the State of Indiana, appropriate for its use as and for a railroad track a strip of land Eighteen (18) feet wide from north to south, extending from east to west along the center of Division Street, from a point Ten (10) rods, Seven and One Half (7½) feet east of the east line of Michigan Street in said city
17 to General Taylor Street, and from thence west to the center of Laurel street, a strip of land Nine (9) feet in width from north to south, being the same parcel of land then occupied by said Railroad Company. And did, in order to acquire and perfect its title to the said Eighteen Feet of land, so that it could lay down a double track thereon, institute proceedings for appropriation in the St. Joseph Circuit court, and cause the interests of the owners in fee of said land so taken and appropriated to be duly appraised and did pay to the various owners of said interest the full appraised value thereof and did also purchase and procure from certain of the owners who were interested in said land as owners of property abutting on said street, deeds of conveyance conveying to said company the interest of said abutting property owners in said land. And the total amount of said award, and the amount paid to the parties to executed deeds to said company, amounting to the sum of over Six Thousand Dollars.

21. And the plaintiff further avers that it also appro-riated for its right of way over Eighteen feet in width from a point ten Rods, Seven and One Half feet east of the east line of Michigan Street to the bridge crossing the St. Joseph River, and paid for the same the sum of Seven Thousand Dollars.

22. And the plaintiff avers that it is now the owner in fee of the said right of way Eighteen Feet wide, extending from the west end of the bridge crossing the St. Joseph River to Taylor Street in the city of South Bend, a distance of about 200 rods.

23. And the plaintiff avers that since the year 1871, this company and its predecessors aforesaid have openly, continuously and notoriously occupied the center of Division Street with its said railroad from the west end of said bridge to Taylor Street, and have always claimed the right to lay down said double track across the St. Joseph River and along said Division Street from the west end of said bridge to the center of General Taylor Street aforesaid whenever the requirements of their business should make it neces-
18 sary, and have expended large sums of money in the maintenance of said track, and have complied with the conditions

required of them by said ordinance with the full knowledge and acquiescence of the city of South Bend and the authorities thereof.

24. It is apparent, and plaintiff so avers the fact to be, that the grant in said ordinance of a right to a second track in said Division Street up to Taylor Street, was intended for the accommodation of the business of the railroad company when at some future time the business of the company should come to be of such magnitude that a single track would not adequately accommodate it, and that said second track should not be laid until that condition occurred. Plaintiff avers that said condition now exists, that for more than one year last past it has been and still is actively engaged in double tracking its entire line of railroad from the city of Port Huron, in the state of Michigan, to the city of Chicago, in the State of Illinois, having been forced thereto by the increase of its business, and that it has already completed the laying of a second track for upwards of 157 miles of said road. It is the purpose of the plaintiff in this connection, at an early date, to convert its existing single track bridge across the St. Joseph River into a double track bridge.

25. It is essential to the successful operation of plaintiff's freight and passenger traffic over its said railroad that it should have and maintain a second track on Division Street, as by said ordinance authorized, and that to facilitate and accommodate the present volume of such traffic said second track is especially necessary in view of the fact that plaintiff's freight and passenger stations for said city of South Bend are located adjacent to said Division Street between the said St. Joseph River bridge and General Taylor Street and that at said station the trains, both of passenger and freight passing over plaintiff's road, have to stop for train orders.

26. It is furthermore apparent, and plaintiff avers the fact so to be, that the obstructing of the general public in the use of said
19 street by passing trains will be much less when two tracks are used than it now is when all trains, both ways, have to pass over a single track, that said street is 82½ feet wide and that there is ample room thereon for general travel and for said double track.

27. Plaintiff avers that at various and frequent times between the time of first building said existing track through Division Street until the present time the said city of South Bend has ratified and confirmed said ordinance so granted as aforesaid to said Peninsular Railroad Company by requiring this plaintiff and its several predecessors aforesaid and especially this plaintiff and said Chicago & Grand Trunk Railway Company to spend money in the changing of the grade of said track, in the planking and grading the same in the manner specified by said ordinance and even in a manner more expensive than so specified, also in lighting and watching crossings of plaintiff's said track with various streets in said city. All of said requirements were complied with and said Chicago and Grand Trunk Railway Company spent large sums of money in so doing, to-wit: the sum of $5,000.00. And said plaintiff spent and must continue to spend large sums of money in so doing, towit: the sum of $3,000.00 annually and in so doing relied on the position assumed by said city that said ordinance was in its entire-y a valid and exist-

ing grant and that the same was to taken and treated by said city and that said city would not attempt to rescind said ordinance or any portion thereof.

27½. Said plaintiff avers that on the first day of January A. D. 1881, said Chicago and Grand Trunk Railway Company did lay down a double track on Division Street between the St. Joseph River and Michigan Street and it and its said assigns have ever since used and plaintiff still uses the same.

28. Plaintiff further avers that on the fourteenth day of October, 1901, the said city of South Bend through its common council assumed by said ordinance to repeal so much of said ordinance
20 granting the right to maintain a railroad in said Division street as gives the right to a second track in said street, and said city now sets up and claims that said action of its common council was effective in that behalf, and that thereby the plaintiff's right to said second track was lawfully revoked. Plaintiff, on the contrary, claims that said ordinance constituted a contract in its entirety as between said city and the railway company in whose behalf it was granted as aforesaid, irrepealable by said city, either in whole or in part, and that plaintiff has succeeded to all the rights of said railroad company under said contract; that said ordinance of repeal is void as violative of said contract and plaintiff's right thereunder, as being in conflict with Section 10 of Article 1 of the Constitution of the United States, and in conflict also with section 24 of article first of the Constitution of Indiana.

29. And plaintiff avers that on the 6th day of October, 1902, plaintiff deeming it necessary in order to accommodate and successfully and properly carry on its business and operate its railroad, to lay down an additional and so construct and operate a double track railroad from the west end of said bridge through and along the central part of Division Street aforesaid from said bridge west to Taylor Street, aforesaid brought to the City of South Bend its work train loaded with rails and ties necessary for the doing of said work and for the laying down of said additional track, and brought to South Bend on said train a force of between thirty and forty laboring men who were in its employ and with said employés commenced to remove dirt and make such slight excavations as were necessary in order to commence the making of said double track railroad on the land so appropriated, and continued on said work for a short period of time, and that then the said mayor of said city with a number of policemen of said city came to the place where the said employés of plaintiff were at work as aforesaid and forbade
21 the continuance of said work, and threatened to arrest each and every one of said workmen who should do any work, or make any excavation, or, as he expressed it, put a shovel or spade in the earth for the purpose aforesaid, and did thereby so alarm and terrify said workmen that they were made to desist from said work and plaintiff was unable and still is unable to proceed therewith and the plaintiff avers that the said Board of Public Works of said city did direct, authorize and approve of the said acts of the said mayor and policemen and do declare and assert that plaintiff has no legal

right to and shall not lay down said second and additional track on said Division Street west of said bridge, and that in case of any attempt on the part of plaintiff so to do, the performance of said work shall be stopped by force and violence and that the police force of said city shall be used for the purpose of preventing such performance; and plaintiff says that the defendants have stated and proclaimed that they will not under any circumstances allow plaintiff to lay down and complete its said double track, and threaten from time to time to place under arrest each of such persons as may be employed by plaintiff in the laying down and completing said double track, and unless restrained, the defendants will by putting the employés of plaintiff in fear and intimidation prevent the completion of said work, and plaintiff avers that the said wholesale arrest of workmen and employés of plaintiff will necessarily result in numerous and long continued law suits and in vexatious litigations.

Wherefore plaintiff prays that defendants and each and all of them be enjoined from in any way hindering or preventing plaintiff from laying down said second and additional track on Division Street, aforesaid, and from arresting any servants, agents, employés or workmen of and who may be employed by plaintiff in laying down such double track, and that it be found and decreed by this Court that plaintiff by grant from the city of South Bend has a valid and indisputable right to lay down, hold, use, maintain
22 and occupy a double track railroad on Division Street aforesaid from said bridge west to Taylor Street in said city, and that its title to said right of way be decreed and adjudged to be valid and defendants and each and all of them, and their servants and agents be enjoined from interfering with, from preventing, interfering with or hindering plaintiff in the exercise and enjoyment of such rights and franchises.

____ ____,

Attorneys for Plaintiff.

23 Paragraph Two.

And for a further and second cause of action, plaintiff avers:

1. That the plaintiff is a railroad company duly organized as a corporation under the laws of the State of Indiana and duly authorized to and now is operating a certain railroad extending from the city of Port Huron in the State of Michigan to Chicago in the state of Illinois, which said railroad is the same railroad formerly known as that of the Peninsular Railroad Company, and passes through the city of South Bend in the State of Indiana, and the railroad has been kept up and maintained by the said Peninsular Railroad Company and its successors as is hereinafter set forth, since the first day of October, 1866.

2. That the city of South Bend is a municipal corporation duly organized under the laws of the State of Indiana; that the said defendant Fogarty is the mayor of said city; that the defendants Koczrowski, Loughman, Montgomery, Elbel, Schrever, Steuckle, Whiteman, Kucharski, Somers, and Hartzer are members of the

common council of said city; That the defendants McInerny, Papczynski, and Nicar are members of and constitute the Board of Public Works of said City; That the defendant McWeeney is the Chief of the police force of said city.

3. That on or about the 24th day of October, 1866, the city of South Bend by William G. George, Mayor; Thomas S. Stanfield; William G. George, Adoniram B. Judson, Clement Studebaker, George Milburn, John Niles, Robert Montgomery, Adolphus Eberhart, William Miller, Esq.; John Brownfield, Charles W. Guthrie, John A. Hendricks, John T. Lindsey, and John H. Keedy duly signed and executed articles of association, whereby they *they* agreed to incorporate themselves together for the purpose of building, owning and operating a railroad from the North line of the State of Indiana in Township Thirty eight North, Range Four (4) West, in St. Joseph County; Thence running southwesterly by way
24 of Mishawake and through South Bend and thence southwesterly and westerly through St. Joseph, Laporte, Porter and Lake Counties to the west line of the State of Indiana in the direction of Chicago in the State of Illinois, said proposed road to be about Eighty-five miles long. Said articles of association were filed in the office of the Secretary of the State of Indiana on the 10th day of December, 1866. In said articles of association it was stated that the capital stock of said company should be one Million Dollars; that there should be thirteen directors who were named therein, and the name of the company should be Peninsula- Railroad Company and the City of South Bend subscribed for and took and held Fifty Thousand Dollars of the capital stock of said railway company.

4. That on the second day of March, 1868, the common council of the city of South Bend duly passed and enacted an ordinance numbered Sixty Two (62) whereby it was ordained that the Peninsular Railroad Company of Indiana was and should be authorized to construct and maintain a track for its said railroad within the city of South Bend upon the following terms, towit:

Commencing at the eastern limits of the said city on the east end of a twenty foot street laid out and dedicated on the south side of Samuel G. Cottrell's Addition to the town of Lowell, or at any point on said twenty foot street that the company might see proper to adopt; "Thence across the St. Joseph River to the eastern end of the extension of Division Street and its extension in said city so far west as the said company may desire, crossing all i-termediate streets and alleys, and to run locomotive cars and trains over said road so far as might be necessary for the conducting of the business of said company." That it was further provided in said ordinance that the right of said company to locate their road through the city of South Bend should be subject to the conditions and terms following towit:

25 1st. That the grant should not — construed to interfere with the private rights of the owners of real estate over which said road might be located, relative to damages for such occupancy and appropriation, but was made subject thereto.

2nd. That when the road crossed any street or alley it should

be made to conform to the grade of such street or alley, unless the common council should consent to a variation of such grade.

3rd. That at the crossing of streets and alleys the company should lay its tracks in such manner as to cause as little obstruction as possible to the use of such streets and alleys for the passage of wagons and other vehicle, and should plank its track between the rails and within at least six feet on each side of said rails at all such crossings the entire width of said street or alley, and should also plank or gravel the side walk where they might cross said railroad and should also make said crossing safe and convenient for the passage of persons and vehicles, and should keep said crossings when so made in good repair so long as they should use the streets and alleys for the purposes aforesaid.

4th. That the company should construct and keep in repair under and on the line of said road at such points as might be deemed necessary by the city engineer, sufficient culverts and drains to admit of the free passage of water along the streets and alleys which might be affected by the construction of said railroad.

5th. That in the event of the failure of the railroad to do the said acts and things so required to be done, and in case the said company should fail to put such crossings in the order above required to be done, or to keep the same in repair and to construct and keep such culverts, then the same should be done by the Street Commissioner of said city under directions of the common council, and the city should collect the cost of the same by suit at law.

6th. It was further provided in said ordinance that the
26 company should not permit cars or locomotives to stand at street or alley crossings so as to obstruct the free passage of teams, vehicles or persons, without danger or inconvenience, and should, when a train was going out or coming in, ring its engine bell so as to give notice of arrival or departure, nor should it run any locomotives or cars on said railroad at a faster rate than five miles an hour between Chapin and Michigan Streets within the limits of said city, under a penalty of ten Dollars ($10.00) for each offense.

5. It was further provided in said ordinance that no more than one track for such road should be laid across any street or said city without the previous assent of the common council of said city, except only the privilege which it is stated; "is hereby granted to lay down a double track acros the bridge over the St. Joseph River, and from the western terminus of said bridge to General Taylor Street in said city, subject of the conditions *of the conditions* hereinbefore contained" and subject also to the provisions that said company should and would indemnif- the city and hold it harmless and free from all damages or costs for the bridging of the said river within the jurisdiction of said city.

6. That the corporation described and referred to in said ordinance was the same corporation which was incorporated as hereinbefore stated, and was generally known and described as the Peninsular Railroad Company.

7. That the Peninsular Railroad abandoned its said road and failed to expend the sum of Fifty Thousand Dollars on its line

within two years from March 11, 1868, whereby, by reason of an act to declare, abandoned certain unfinished railroads and to provide for their completion and to declare forfeited the franchises of certain railroad companies, and for the assessment of the value thereof, and for the organization of new companies, and for making annual statements, approved March 11, 1867, the said company forfeited its rights and privileges and therefore, for the purpose of com-
27 pleting said abandoned road and being invested with all the rights, privileges and immunities formerly held by the said Peninsular Railroad Company, Thomas S. Stanfield, the city of South Bend, St. Joseph Iron Company, Judson, Montgomery & Company, Clark and Judson, A. Eberhart and Co. H. B. and L. W. Martin, Wm. W. Butterworth, Q. A. Adams, George Milburn and Company, the city of Valparaiso and fourteen others did, on the 6th day of October, 1869, organize and associate themselves as a corporation for the purpose of completing said railroad, and did thereby become a corporation under the name of the Peninsular Railroad Company, with a capital stock of $500,000.00, and the defendant the city of South Bend subscribed for and took and paid for $50,000.00 of said capital stock, which said articles of association were filed with the Secretary of State of the State of Indiana on the 14th day of October, 1869.

And plaintiff avers that it thereupon became the duty of the said last mentioned Peninsular Railroad Company to proceed to cause the value of the rights, privileges, interests, rights of way, franchises, properties and immunities of the said first named company to be appraised by three free holders residing in some county through which the road passes, and to cause a valuation thereby to be put on said rights, privileges, interests, rights of way, franchises, properties and immunities and to pay into the treasurer of some county on the line of the road an amount of money equal to such appraised value. And plaintiff avers that it is unable to find any record, paper, book, entry or document of any sort whatever showing or tending to show that any appraisement was made as required by law, or that any of said money was paid. But plaintiff avers that the said second named Peninsular railroad did with the consent of said first named company and without objection by the first named company or any stockholder or creditor thereof and with the assent of the said city of South Bend, and without the objection on the part of the said city of South Bend took possession of all the rights, privileges, franchises, rights of way, interests, properties and
28 immunities of the said Peninsular Railroad Company.

And plaintiff avers that thereupon the said first named Peninsular Railroad Company did assent to said act of appropriation by said new company and did surrender and deliver to said new company the possession of all its property, and did permit and allow the said new company to take possession of, hold, own and control all of said rights, privileges, franchises property rights of way and immunities of said first mentioned company, and the said new company with the consent and approbation of the said city of South Bend, did thereupon take possession of the right of way of all of the

property of the first said mentioned company, including the rights granted by the said ordinance of March 2, 1868.

8. That thereafter, on or about the 1st day of May 1870, the said Peninsular Railroad Company, under and in accordance with the statutes of the State of Indiana, did unite and consolidate with two other railroads, namely; the Peninsular Railroad Company of Michigan, which had been organized for the purpose of and was engaged in building a railroad from the eastern terminus of the railroad proposed to be built in Indiana running north easterly in the direction of Port Huron, Michigan, and the Peninsular Railroad Company of Illinois, which was organized for the purpose of building a railroad westerly from the westerly terminus of the road of the said Peninsular Railroad Company of Indiana in the direction of the City of Chicago; and did agree to consolidate for the purpose of building and completing a railroad on the line hereinbefore mentioned and an extension thereof on the east in the direction of Port Huron and an extension thereof in the west in the direction of Chicago, and that thereby the said Peninsular Railway Company became entitled to all the property, rights and franchises of the said Peninsular Railroad Company of the State of Indiana, and of its several constituent corporations; that at the time of said con-
29 solidation the proposed railroad of said Peninsular Railroad Company met and joined the lines of road of said two other companies at the north and west line of the State of Indiana, and formed one continuous line; that thereupon the said Peninsular Railway Company entered on and took possession of all of the rights of way and other property of said Peninsular Railroad Company of Indiana; that at that time the said Peninsular Railroad Company in the State of Indiana was not completed, and thereupon, supposing and believing that the said transfer made by the said original Peninsular Railroad Company to the said Peninsular Railroad Company had been made in all respects in accordance with the laws of the State of Indiana, and that the property of the first named Peninsular Railroad Company had been duly appraised according to the statute hereinbefore mentioned, and that the appraised value thereof had been properly paid to the treasurer of the proper county, and supposing and believing that by virtue of such re-organization and of such appraisement and payment the said Peninsular Railroad Company of Indiana had been vested with and become the owner of all the rights, privileges, franchises, interests, rights of way, titles of the first mentioned Peninsular Railroad Company, the said last named Peninsular Railway Company did proceed to grade for a railroad track all of the right of way of said proposed road from Battle Creek, Michigan, to a point as far west as the city of Valparaiso in the state of Indiana; that it did all the necessary grading for the railroad, put in all necessary bridges, bought and laid down iron and did put down a single track of railroad, from Battle Creek to Valparaiso as aforesaid and did complete the same so as to run cars thereon on or about the year 1871, and did expend in the construction of said railroad on the line be-

tween Battle Creek and Valparaiso the sum of over a Million Dollars.

30 9. That by a certain mortgage, dated May 1, 1870, the said Peninsular Railway Company did mortgage its said railroad to the Union Trust Company of New York, to secured borrowed money amounting to about Three Million Dollars, all of which money was expended by the said Peninsular Railway Company in the construction of said railroad through the county of St. Joseph and extensions thereof into the State of Michigan.

10. That by a certain agreement of consolidation, dated April 18, 1873 the said Peninsular Railway Company and a certain other railroad company known as the Port Huron and Lake Michigan Railroad Company did unite, and thereby form a new corporation known as the Chicago and Lake Huron Railroad Company, by which consolidation the Chicago and Lake Huron Railroad Company succeeded to and at once took possession of all of the property, rights, powers, privileges and franchises and became the owner of the said railroad. That at the time of such consolidation the said Peninsular Railway Companyes railroad extended over and along the line of, and was the Peninsular Railroad through St. Joseph County, Indiana, and connected with Port Huron and Lake Michigan Railroad at Lansing, Michigan, forming one continuous line.

11. That afterwards the said Union Trust Company of New York brought suit against the Chicago and Lake Huron Railway Company and others to foreclose the last mentioned mortgage in the Circuit Court of the United States, of the District — Indiana, and such proceedings were had that on or about the 29th day of September, 1879, a decree was rendered foreclosing said mortgage, and on February 7, 1880, William P. Fishback, a Commissioner of said Court, by virtue of said decree and an order of sale issued thereon, sold and conveyed all of said railroad in the State of Indiana, being that formerly owned by said Peninsular Railway Company and hereinbefore described, to Joseph Hickson, E. W. Meddaugh, Henry W. Smithers and William F. Whitehouse, conveying to the

31 said purchasers, all of the rights, privileges and franchises of said Chicago and Lake Huron Railroad Company.

12. That on the 6th day of January, 1880, the above named purchasers and others associated with them, executed certain articles of association, whereby they associated and duly organized as a corporation under the name of the Indiana Railway Company under and in accordance with the laws of the State of Indiana, for the purpose of operating said railroad, and said articles of association were thereafter, to wit: on the 17th day of January, 1880, duly filed in the office of the Secretary of State of the State of Indiana.

13. That afterwards, to wit: on the 10th day of March, 1880, the said Joseph Hickson, Elijah W. Meddaugh, Henry W. Smithers, and William F. Whitehouse did execute and deliver to the said Indiana Railway Company a deed of conveyance, conveying to the Indiana Railway Company so much of said railroad as was located in the State of Indiana, together with all the rights, franchises and privileges held by said purchasers.

14. And plaintiff avers that afterward, to wit, on the 7th day of January, 1880, the said Indiana Railway Co. by articles of agreement made between said company and the North Western Grand Trunk Railway Company in Illinois and Indiana; the Michigan Railway Company; the Chicago and North Eastern Railway Co.; and the North Western Railway Co. in Michigan, the same having connected lines of railroad, did consolidate and unite said corporations, and form a new railroad company by the name of Chicago and Grand Trunk Railway Company, whereby the said Chicago and Grand Trunk Railway Company became the owner of and took possession of all of said railroads and all of the rights, privileges and franchises of the said several railroad companies hereinbefore mentioned, which said railroads formed a continuous line from the city of Port Huron Michigan, to the City of Chicago, Illinois, including the railroad of the Peninsular Railway company above described.

32 And thereupon the said Chicago and Grand Trunk Railway Company supposing and believing that all the rights, title, privileges, interests, easements and rights of way of the said first named Peninsular Company had been properly and in due order and by proper course of law been legally transferred to and vested in the said Peninsular Railroad Company of Indiana and by subsequent conveyances and transfers and consolidations had become its property and that it was entitled among other things to construct its railroad through the state of Indiana on the lines aforesaid and to keep up and maintain a single line of track through Division Street in the City of South Bend, and whenever its requirements should make it necessary, to lay down and construct a double track through that portion of Division Street in the city of South Bend lying between Taylor Street and the bridge, did take possession of all of said line of railroad and did finish and complete the same between the city of Chicago and the city of Port Huron in the State of Michigan, and in finishing and completing the said railroad as aforesaid did expend the sum of over a Million Dollars.

And plaintiff avers that afterwards the said Chicago and Grand Trunk Railway Company executed and delivered to certain trustees a certain mortgage on its said railroad, and afterwards, on the 17th of September, 1900, in a suit then pending in the Circuit Court of the United States for the District of Indiana, between the Mercantile Trust Company of New York, which was complainant, and the Chicago and Grand Trunk Railway Company and others which were defendants a decree was rendered by said court foreclosing said certain mortgage executed and delivered by Chicago and Grand Trunk Railway Company, and the Railroad of the said Chicago and Grand Trunk Railway Company, with all its rights, privileges and franchises, was ordered to be sold and an order of sale was issued on said decree, and one Walter S. Harshaw, Commissioner of the United States Circuit Court, by order of the said court, did

33 sell and conveyed to Charles M. Hayes, and Elijah W. Meddaugh all of the said railroad with its rights, franchises and other property lying in the State of Indiana, and did as such Com-

missioner execute and deliver to the said Charles M. Hays and Elijah W. Meddaugh a deed of conveyance conveying to them all of said railroad, with its franchises, lying and being in the State of Indiana.

16. That afterwards, to wit: on or about the 19th day of November, 1900 the said Charles M. Hays and Elijah W. Meddaugh, together with other persons who were associated with them, entered into articles of association whereby they duly formed under the statutes of this state a corporation under the name of the Indiana and Illinois Railway Company for the purpose of operating said railroad, which said articles of association were duly filed in the office of the Secretary of State of the State of Indiana.

17. That afterwards, to wit: on the 20th day of November 1900 the said Charles M. Hays and Elijah W. Meddaugh did execute and deliver to the Indiana and Illinois Railway Company a certain deed of conveyance, whereby they conveyed to the said Indiana and Illinois Railway Company all of the said railroad track formerly belonging to the Chicago and Grand Trunk Railway Company, together with all its rights and franchises.

18. That afterwards, to wit: on the 20th day of November, 1900, an agreement was entered into by and between the Port Huron and Indiana Railway Company, and the said Indiana and Illinois Railway Company, the first named company being incorporated under and by virtue of the laws of the state of Michigan and extending from the city of Port Huron, Michigan, to a point in the northerly line of the state of Indiana where it met and joined the railway of said Indiana and Illinois Railway Company Whereby the said Port Huron and Indiana Railway Company and the said Indiana and Illinois Railway Company did consolidate and become one railroad company under the name of the Grand Trunk Western
34 Railway Company, this plaintiff, and the said agreement and said articles of consolidation were duly filed with the Secretary of State of the State of Indiana whereby the said plaintiff became the owner and took possession of all of said railroad so situate in St. Joseph County in the State of Indiana and entitled to all the rights, privileges and franchises of said Peninsular Railway Company.

And plaintiff avers that when it so acquired title to said railroad and took possession thereof it supposed and believed that all of the proceedings relating to the abandonment of said first named Peninsular Railroad and the taking possession of said railroad property by said Peninsular Railroad Company of Indiana were taken and carried on and performed in accordance with the laws of the State of Indiana and that as the successor of said other corporations herein before named it had a good and perfect title to all the rights, privileges, franchises and easements of the said other companies hereinbefore named, and that it had the right to keep up and maintain a single line of track through Division Street in the city of South Bend and that the Ordinance hereinbefore mentioned enacted by the city of South Bend gave to the said Peninsular Railroad Company the right to lay down a double track through said portion of Di

vision Street in the city of South Bend, between the bridge over the St. Joseph River in South Bend and Taylor street in said city was valid and in every respect and that the rights granted by said ordinance had passed to and belonged in succession to the several railroad companies hereinbefore mentioned as successors to said first named Peninsular Railroad Company and under such supposition and belief and in good faith did proceed to lay down and complete a double track on its railroad along a large portion of its line, and at the time of the commencement of this action had expended in the construction of said double track over a Million Dollars.

18½. And Plaintiff avers that on the first day of January, 1881, the said Chicago and Grand Trunk Railway Company did lay down a double track on Division Street between the St. Joseph River and Michigan street in said city and it
35 and its assigns have ever since used and plaintiff still uses the same.

19. And plaintiff avers that the said Peninsular Railway Company in the year of 1871, relying on the full force of the ordinance of defendant city, above mentioned, did build its said railroad through St. Joseph County in the State of Indiana, and did build a single track through Division Street in the city of South Bend, and in so doing did lay a single track of rails on Division Street in the city of South Bend from the west end of the bridge crossing the St. Joseph River in said city, and did extend its tracks therefrom to the west side of Laurel Street in said city, and that said track was laid in the center of said street, and southwesterly from said Laurel Street to the west side of said county, and that the said Peninsular Railway Company and its successors hereinbefore mentioned each relying likewise on the full force of said ordinance, have ever since kept up and maintained and operated the same as a railroad, and that this plaintiff is now operating the same as a railroad, and as a part of its continuous lines.

20. And plaintiff avers that in the year 1881 the said Chicago and Grank Trunk Railway Company, which Company was then operating and maintaining said railroad, desired to acquire and perfect its title to the land used by it, and which it would be necessary to use in operating its road, as a right of way Through Division Street in said city, and to settle with and compensate the owners of said land for their interests in the central portion of the street so taken, used and occupied or to be thereafter used and occupied by said Railway Company, and relying on the validity of said franchise and right of way to occupy said street, so granted by the said Common Council of the city of South Bend on March 2, 1868, did, in accordance with the statutes of the state of Indiana, appropriate for its use as and for a railroad track a strip of land Eighteen (18) feet wide from north to south, extending from east to west along the center of Division Street, from a point Ten (10) rods Seven and one half (7½) feet east of the east line of Michigan street in said
36 city to General Taylor Street and from thence west to the center of Laurel Street, a strip of land Nine (9) feet in width from north to south, being the same parcel of land then occupied by

said railroad company. And did in order to acquire and perfect its title to the said Eighteen feet of land, so that it could lay down a double track thereon, institute proceedings for appropriation in the St. Joseph Circuit Court, and cause the interest of the owners in the fee of said land so taken and appropriated to be duly appraised and did pay to the various owners of said interest a full appraised value thereof and did also purchase and procure from certain of the owners who were interested in said land as owners of property abutting on said street, deeds of conveyance conveying to said company the interest of said abutting property owners in said land. And the total amount of said award, and the amount paid to the parties who executed deeds to said company, amounted to the sum of over Six Thousand Dollars; and that the making of said appropriation and the purchase of said strip of land Eighteen (18) feet wide were matters of public notoriety and it was well known to the city of South Bend and the inhabitants thereof that the Chicago and Grand Trunk Railway Company was making such appropriation and condemnation of land and *bind* the fee of said strip of land which it so intended to use for a double track and no objection whatever was made by the said city of South Bend to said acts of appropriation.

21. And the plaintiff further avers that it also appropriated for its right of way over Eighteen feet in width from a point ten rods, seven and one half feet east of the east line of Michigan Street to the bridge crossing the St. Joseph River, and paid for the same the sum of Seven Thousand Dollars.

22. And the plaintiff avers that it is now the owner in fee of the right of way Eighteen feet wide, extending from the west end of the bridge crossing the St. Joseph River to Taylor street in
37 the city of South Bend, a distance of about 200 rods.

23. And plaintiff avers that since the year of 1871, this company and predecessors aforesaid have openly, continuously, and notoriously occupied the center of Division Street with its said railroad from the west end of said bridge to Taylor Street, and have always claimed the right to lay down said double track across the St. Joseph River and along said Division Street from the west end of said bridge to the center of General Taylor Street aforesaid whenever the requirements of their business should make it necessary, and have expended large sums of money in the maintenance of said track and have complied with the conditions required of them by said ordinance with the full knowledge and acquiescence of the city of South Bend and the authorities thereof.

24. It is apparent, and the plaintiff so avers the fact to be that the grant in said ordinance of a right to a second track in said Division Street up to Taylor Street, was intended for the accommodation of the business of the railroad company when at some future time the business of the company should come to be of such magnitude that a single track would not adequately accommodate it, and that said second track should not be laid until that condition occurred. Plaintiff avers that said condition now exists, that for more than one year last past it has been and still is actively engaged in double tracking its entire line of railroad from the city of Port Huron, in the State

of Michigan, to the city of Chicago, in the State of Illinois, having been forced thereto by the increase of its business and that it has already completed the laying of a second track for upwards of 157 miles of said road. It is the purpose of the plaintiff in this connection, at an early date, to convert its *consisting* single track bridge across said St. Joseph River into a double track bridge.

25. It is essential to the successful operation of plaintiff's freight and passenger traffic over its said railroad that it should have
38 and maintain a second track on Division Street, as by said ordinance authorized, and that to facilitate and accommodate the present volume of such traffic said second track is especially necessary in view of the fact that plaintiffs freight and passenger stations for said city of South Bend are located adjacent to said Division Street between the said St. Joseph River bridge and General Taylor Street and that at said station the trains, both of passenger and freight, passing over plaintiff's road have to stop for train orders.

26. It is furthermore apparent, and plaintiff avers the fact so to be, that the obstruction of the general public in the use of said street by passing trains will be much less when two tracks are used than it now is when all trains, both ways, have to pass over a single track; that said street is Eighty two and one half (82½) feet wide and that there is ample room therein for general travel and for said double track.

27. Plaintiff avers that at various and frequent times between the time of first building said existing track through Division Street until the present time the said City of South Bend had ratified and confirmed said ordinance granted as aforesaid to said Peninsular Railroad Company by requiring this plaintiff and its several predecessors aforesaid and especially this plaintiff and said Chicago and Grand Trunk Railway Company to spend money in the changing of the grade of said track, in the planking and grading the same in the manner specified by said ordinance and even in a manner more expensive than so specified, also in lighting and watching crossings of plaintiff's said track with various streets in said city. All of said requirements were complied with and said Chicago and Grand Trunk Railway Company spent large sums of money in so doing, towit: The sum of $5000.00. And said plaintiff spent and must continue to spend large sums of money in so doing, towit: the sum of $3000.00 annually, and in so doing relied on the position assumed by said city that said ordinance was in its entirety a valid and existing grant and that the same was so taken and treated
39 by said city and that said city would not attempt to rescind said ordinance or any portion thereof.

And plaintiff avers that by reason of the facts aforesaid the said city of South Bend is and should be stopped from denying the abandonment of its railroad by said first mentioned Peninsular Railroad Company and from asserting that the said Peninsular Railroad Company of Indiana did not acquire a full, perfect and complete title to all the rights, privileges interests, rights of way, franchises, easements and other property of said first mentioned company, and is and should be stopped from claiming or asserting that the plain-

tiff as assignee and successor of the first named Peninsula- Railroad Company has not the right to lay down said double track in the portion of Division Street hereinbefore mentioned.

27½. And plaintiff avers that the said city knew of each and every of the purchases aforesaid and each and every of the expenditures made by this plaintiff and its assignors and predecessors in title and that they were made upon the faith of the validity of the ordinance grant, and that the city remained quiet and omitted to make known to the Company any intention to avoid any portion of the ordinance or weaken it in any way in its entirety, but allowed all of said purchases and consolidations to be made and allowed the plaintiff and its said assignors and predecessors in title to spend the said $1,000,000.00 and other sums of money upon the understanding that the said ordinance was valid in every respect and would be kept and performed by the city, and that if now the said city of South Bend should succeed in rescinding so much as pertains to a double track, it would cast upon the plaintiff not only a great financial loss in requiring it to operate the same in a more expensive manner than the ordinance provides but will cause great and irreparable money loss in increase- expenses of operation, and in the delay to its trains, the one waiting for another, and that it will, to a large extent, cripple the capacity of double track portion of its road by compelling the plaintiff to operate this section of its road upon single track methods, and such action on the part of this city will be inequitable in view of the facts, and that the city should be stopped from taking such action.

28. Plaintiff further avers that on the 14th day of October, 1901, the said city of South Bend through its common council assumed by ordinance to repeal so much of said ordinance granting the right to maintain a railroad in said Division Street as gives the right to a second track in said street and did pass such ordinance, and said city now sets up and claims that said action of its common council was effective in that behalf, and that thereby the plaintiff's right to said second track was lawfully revoked.

Plaintiff, on the contrary, claims that said ordinance constituted a contract in its entirety as between said city and the railway company in whose behalf it was granted as aforesaid, irrepealable by said city, either in whole or in part, and that plaintiff has succeeded to all the rights of said railroad Company under said contract; that said ordinance of repeal is void as violative of said contract and plaintiff's rights thereunder, as being in conflict with Section Ten of Article One of the Constitution of the United States, and in conflict also with Section Twenty Four of Article First of the Constitution of Indiana.

29. And plaintiff avers that on the 6th day of October 1902, plaintiff deeming it necessary in order to accommodate and successfully and properly carry on its business and operate its railroad, to lay down an additional track and so to construct and operate a double track railroad from the west end of said bridge through and along the central part of Division Street aforesaid from said bridge west to Taylor Street aforesaid, brought to the City of South Bend its

work train loaded with rails and ties necessary for the doing of said work and for the laying down of said additional track, and brought to South Bend on said train a force of between Thirty and Forty laboring men, who were in its employ, and with said em-
41 ployees commenced to remove dirt and make such slight excavations as were necessary in order to commence the making of said double track railroad on the land so appropriated, and continued on said work for a short period of time, and that then the mayor of said city with a number of the policemen of said city came to the place where the said employees of plaintiff were at work as aforesaid and forbade the continuance of said work, and threatened to arrest each and every one of said workmen sho should do any work, or make any excavation, or as he expressed it, put a shovel or spade in the earth for the purpose aforesaid, and did thereby so alarm and terrify said workmen that they were made to desist from said work and plaintiff was unable and still is unable to proceed therewith and the plaintiff avers that the said board of public works of said city did direct authorize and approve of the said acts of the said mayor and policemen and do declare and assert that plaintiff has no legal right to and shall not lay down said second and additional track on said Division Street west of said bridge and that in case of any attempt on the part of the plaintiff so to do, the performance of said work shall be stopped by force and violence and that the police force of said city shall be used for the purpose of preventing such performance; And plaintiff says that the defendants have stated and proclaimed that they will not under any circumstances allow plaintiff to lay down and complete its said double track, and threaten from time to time to place under arrest each of such persons as may be employed by plaintiff in the laying down and completing said double track, and unless restrained, the defendants will by putting the employees of plaintiff in fear and intimidation prevent the completion of said work, and plaintiff avers that the said wholesale arrest of workmen and employees will necessarily result in numerous and long continued law suits and in vexatious litigation.

Wherefore Plaintiff Prays That defendants and each and all of them be enjoined from in any way hindering or preventing plaintiff from laying down said second and additional track on Di-
42 vision Street aforesaid, and from arresting any servants, agents, employees or workmen of and who may be employed by plaintiff in laying down such double track, and that it be found and decreed by this Court that plaintiff by grant from the city of South Bend has a valid and indisputable right to lay down, hold, use, maintain and occupy a double track railroad on Division Street aforesaid from said bridge west to Taylor Street in said city, and that its title to said right of way be decreed and adjudged to be valid and defendants and each and all of them, and their servants and agents, be enjoined from interfereing with, from preventing, interfering with or hindering plaintiff in the exercise *in* the enjoyment of such rights and franchises.

ANDERSON, DU SHANE AND CRABILL,
Attorneys for Plaintiff.

43 Be it remembered that afterward, to wit: on the 24th day of February, 1904, the same being the third juridical day of the February term, 1904, of said Court, the following further proceedings were had in the said above entitled cause, to wit:

THE GRAND TRUNK WESTERN RY. CO.
vs.
THE CITY OF SOUTH BEND et al.

Demurrer to Am. Complaint Filed.

Now come the parties by counsel and the defendant city of South Bend files its separate demurrer in these words, to wit:

STATE OF INDIANA,
County of Laporte, ss:

In the Laporte Circuit Court, February Term, 1904.

THE GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Demurrer to Amended Complaint.

Demurrer.

The defendant, the city of South Bend, demurs to the amended complaint herein and for cause says that said complaint does not state facts sufficient to constitute a cause of action against this defendant.

FRANK H. DUNNAHOO,
L. HUBBARD, &
OSBORN & McVEY,
Att'ys Def't.

And be it further remembered that afterward, to wit: on the 24th day of March, 1904, the same being the 28th juridical day of the February Term, 1904, of said Court, the following further proceedings were had in said cause, to wit:

THE GRAND TRUNK WESTERN RAILWAY CO.
vs.
THE CITY OF SOUTH BEND et al.

44 *1st Demur. Overruled.*

Demurrer of City South Bend Overruled.

Now come the parties herein by counsel, and the Court overrules the separate demurrer of the defendant city of South Bend hereto-

fore filed to plaintiff's complaint, to which ruling of the Court the defendants each separate- and severally except, and on motion of plaintiff the defendants are ruled to answer by the 25th day of April, 1904. Thereupon, on motion, and by agreement, this cause is set specially for the 23rd day of May, 1904, the same being the first day of the next term of this Court.

And be it further remembered that afterward, to wit: on the 25th day of April, 1904, the same being a day in vacation after February term, 1904, the following further proceedings were had in the above entitled cause, to wit:

THE GRAND TRUNK WESTERN RAILWAY CO.
vs.
THE CITY OF SOUTH BEND et al.

Answer Filed.

APRIL 24, 1904.

Now on this the 25th day of April, 1904, come the defendants herein by counsel, and file in the office of the Clerk of the Laporte Circuit Court their answer to plaintiff's complaint, in these words, to wit:

STATE OF INDIANA,
County of Laporte, ss:

In the Laporte Circuit Court.

THE GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Answer.

Par. 1. The defendants for a first answer to the plaintiff's complaint deny each and every allegation therein contained.

Par. 2. And for a further and second defense defendant says:

That so much of Section Three, Ordinance No. 62 of said
45 city as grants to the Peninsular Railroad Company the right to lay a double track from the western terminus of the bridge across the St. Joseph River to General Taylor Street in said city in invalid for the reasons following: That the building and use of two tracks in said street will necessarily destroy it as a public thoroughfare and will deprive the abutting owners thereon of reasonable access to their property. That said street in said limits is Fifty feet in width exclusive of the side walks which are sixteen feet wide each. That a single track lies in the center thereof. That a second track will occupy so much of the residue of said street that travel and traffic will be driven therefrom the said street in said limits be useless as a public street and highway for footmen and vehicles

in said city. That in 1868 said city was a city of Ten thousand people, and all railroads and factories therein had been built on the south side of Division Street and the main and business portion thereof lay on the north of Division Street and the travel and traffic of said city was along and across Division Street and especially between said river and Taylor street was over and along said street. That said street was greatly injured in 1868 by the construction of a single track and if a second track is laid therein would be wholly destroyed.

That said facts herein alleged were true at the time of the passage of said ordinance No. 62 and *has* been true ever since and are still true.

Par. 3. And for a further and third defense defendants say:

That by the terms of the said ordinance No. 62 by the authority of which the Peninsular Railroad Company laid down its railroad track on Division Street in said city and over and across all intersecting streets and alleys it was provided: Second. "That when said railroad crossed any street or alley it should be made to conform to the grade of such street or alley unless the common council should consent to a variation of such grade," and such grant
46 was made subject to such condition and the right to lay any and all tracks was subject to such condition. That said railroad track was prior to the year 1881 so laid as to conform to such grades as fixed by said common council.

That thereafter the said railroad was owned and operated by the Chicago and Grand Trunk Railway Company and did intersect and cross more than twenty streets and alleys of said city, and said company without the authority of said city and without the consent of the common council of said defendant city and without any right so to do, raised its bridge across the St. Joseph River in said city and the grade of its railroad and its ties at the intersection of Division Street and Pearl Avenue one foot and in like manner raised its ties and rails at the intersection of all other streets and alleys in said city from six inches in some cases to one foot in other cases above the grades of all other street and alley crossings of said railroad in said city, and ever since -as without right and without the consent or authority of said city council and its officers maintained its railroad track, and said plaintiff has and does so maintain its railroad track above the grade fixed by the common council of said city, on the whole of Division Street in said city.

That the common council of said city on July 11, 1887, required said Chicago and Grand Trunk Railway Company to lower its track to the proper grade which said company and all other companies since that time operating said railroad have refused and neglected to do.

That thereafter the plaintiff proposed and intended to lay other and further tracks on said street and proposed and intended and attempted to lay the same above the grades of all such street and alley crossings and to operate them in connection with and as a part of said railroad already so above the grade of said street and street and alley crossings which the defendant as officers of said

city refused to *commit* to be done, which acts are the acts complained of in said complaint.

47 Par. 4. And for a further and fourth defense defendants say:

That by the terms of said ordinance No. 62 by the authority of which the Peninsular Railroa dCompany laid its railroad track on Division Street in said city and over and across all intersecting streets and alleys it was provided:

Second. "That when said railroad crossed any street or alley it should be made to conform to the grade of such street or alley unless the common council should consent to a variation of such grade and such grant was made subject to such condition and the right to lay any and all tracks was subject to such condition."

That by section Three of said ordinance No. 62 it was provided that the right to lay any double track was subject to the conditions of said ordinance, and it was a condition as hereinbefore alleged that said railroad should conform to the grades of street and alley crossings as fixed by said council and cause as little obstruction as possible to the use of streets and alleys for the passage of vehicles. That said railroad track was prior to the year 1881 so laid as to conform to such grades as fixed by the common council.

That thereafter said railroad was owned and operated by the Chicago and Grank Trunk Railway Company and did intersect and cross more than twenty streets and alleys of said city.

That in the year 1882, Thomas S. Stanchfield claimed to be the agent, attorney and a director of said Chicago and Grand Trunk Railway Company and came to the common council of said city and represented to said council that he was such agent, attorney and director and that said company desired to raise its bridge across the St. Joseph River and to raise its track at the crossing of Vistula Avenue in said city which avenue lies at the west end of said bridge and to put a passage way under its track at the intersection of Vistula Avenue and Division Street at the west end of said bridge and said Stanchfield prepared an ordinance to that effect, which

48 ordinance was, on the faith of and relying on the statements of said Stanchfield, passed by said council and is known as Ordinance No. 651 passed Sept. 25, 1882. That by the terms of said ordinance No. 651 said company was authorized to make a passage way under its railroad at the intersection of Vistula Avenue and Division Street and to raise its grade at that point at a level One and Eight tenths feet above the former grade, and to raise the grade of other street and alley crossings of said railroad to conform thereto.

That said bridge was thereafter constructed on a grade one foot above the former grade as fixed by the council and the grade at the said Vistula Avenue crossing of said railroad was raised one foot and the railroad laid thereon, and the grade of said railroad at the crossings of streets and alleys in said city on both ends of said bridge was raised declining in both erections until the raise of street and alley grades intersecting said railroad to the number of more than twenty

were from six inches to one foot above their former grade, on the whole of Division Street in said city.

That thereafter said railroad company delayed and neglected and finally refused to build said under passage of Vistula Avenue and its officers and agents denied the authority of said Stanfield to promise and agree that such under passage should be built and denied that the grade of said track had been raised under authority given in said ordinance No. 651, and denied that any use had been made of said ordinance No. 651, and claimed that the grade was raised without the expressed consent of the common council of said city.

That thereupon on July 11, 1887, by ordinance, No. 769 said common council repealed said ordinance No. 651 and ordered that the grade of Division Street be and remain as it was fixed prior to the passage of said ordinance No. 651, and said Chicago and Grand Trunk Railroad was required within ninety days after the passage of said ordinance to lower its track at the intersection of
49 Division Street and Vistula Avenue to such grade; that said company and all other railroad companies since that time operating said railroad have neglected and refused to lower the said railroad track to its former grade, but have maintained its railroads at the intersections and crossings of all of the streets and alleys of said city from six inches to one foot above the grade as fixed by said city on the whole line of Division Street in said city and this plaintiff has and does so maintain its railroad track above the grade fixed by the Common council of said city, and thereafter before the commencement of this suit, proposed and intended to lay other and further tracks on said Division Street, and proposed and intended and attempted to lay the same above the grade of said street and all alley crossings which the defendants, as officers of said city refused to permit to be done, which acts are the acts complained of in said complaint.

Par. 5. And for a further and fifth defense defendants say:

That said ordinance No. 62 was passed on March 2, 1868, and that by the third section thereof, the privilege was granted to lay a double track across the bridge over the St. Joseph River in said city and thence west to General Taylor Street, subject to the conditions therein contained. That at the time of the passage of said ordinance, the city of South Bend had a population of about Seven Thousand persons and Division Street in said city was an unimportant street, but little used by vehicles and but little crossed by pedestrains and vehicles in the travel and traffic of the public. That the main and business portion of said city lay from the north of Division Street, and that said single track could be and was built upon said street with great detriment to the public. That since that time and to the year 1901 and ever since said city has been growing rapidly and it had on October 14, 1901, a population of Thirty seven Thousand persons and has now a population of Forty Thousand persons; that the Lake Shore and Michigan Southern Railway lay to
50 the south of Division Street and is and always has been a railroad that has done a larger part of the railway business of said city. That the traffic and travel from said city upon

said railroad very greatly increased between 1868 and 1900 and that between 1868 and 1900 new railroads have been built, to wit: The Terre Haute and Logansport Railroad, the Indiana, Illinois and Iowa Railroad, the St. Joseph, South Bend and Southern Railroad, all of which came into said city on the south of Division Street and said railroads have largely increased the gravel and traffic that has passed from the business portion of said city on the north to said railroads to the south of Division Street.

That large factories have grown up and largely increased their business since 1868 on the South side of Division Street. That the principal growth of said city has been for the most part on the south side of said Division Street, and said street became in 1900 and since a principal thoroughfare of said city and a great part of the travel and traffic of said city has passed and still passes over the plaintiff railroad on Division Street from the main portion of the city to the railroads and factories on the south thereof and said Division Street is also largely used in travel and traffic along its whole line and particularly between the St. Joseph River and General Taylor Street. That the conditions have so changed and had so changed before 1901 and since 1868 that a second track upon said street would be a great injury and detriment to public travel and traffic, and will be destructive of its use as a public highway and greatly obstruct the business interests of said city and its citizens and be a source of increased danger to the public. That the construction and use of a second track on said street between the St. Joseph River and Gen. Taylor Street will necessarily destroy said street as a public thoroughfare and will deprive the abutting owners thereon of reasonable access to their property. That in view of these facts the common council of the defendant city on October 14, 1900, repealed
51 so much of Section Three aforesaid as provided for the construction of a double track on Division Street and the other defendants have refused to permit said additional track to be laid, which are the acts complained of in the plaintiff's complaint.

Par. 6. And for a further and sixth defense defendants say:

That said ordinance No. 62 was passed on March 2, 1868 and that by the third section thereof, the privilege was granted to lay a double track across the bridge over the St. Joseph River in said city and thence west to General Taylor Street, subject to the conditions therein contained. That for over 33 years, towit: From March 2, 1868, when said ordinance No. 62 was passed to October 14, 1901 when the provisions thereof permitting a double track on Division Street was repealed, no such double track was ever constructed between said bridge and General Taylor Street, and no expenditure made by plaintiff for the construction thereof within said limits.

That at the time of the passage of said ordinance No. 62, the city of South Bend had a population of about seven Thousand persons and Division Street in said city was an unimportant street, but little used by vehicles and but little crossed by pedestrians and vehicles in the travel and traffic of the public. That the main and business portion of said city lay to the north of Division Street and that said

single track could be build upon said street without great detriment to the public. That since that time and to the year 1901 and ever since said city has been growing rapidly and it had on October 14, 1901 a population of Thirty seven Thousand persons and has now a population of Forty thousand persons; That the Lake Shore and Michigan Southern lay to the south of Division Street and is and always has been the railroad that has done the larger part of the railway business of said city. That traffic and travel from said city upon said railroad very greatly increased between 1868 and 1900

that between 1868 and 1900 new railroads had been built,
52 towit: The Terre Haute and Logansport Railroad, the Indiana, Illinois and Iowa Railroad, the St. Joseph, South Bend and Southern Railroad, all of which came into said city on the south of Division Street and said railroads have largely increased the travel and traffic that has passed from the business portion of said city on the north to said railroad to the south of Division Street.

That large factories have grown up and largely increased their business since 1868 on the south side of Division Street. That the principal growth of said city has been for the most part on the south side of said Division Street, and said street became in 1901 and since a principal thoroughfare of said city and a great part of the travel and traffic of said city has passed and still passes over the plaintiff railroad on Division Street from the main portion of the city to the railroads and factories on the south thereof, and said Division Street is also largely used in travel and traffic along its whole line and particularly between the St. Joseph River and General Taylor Street. That the conditions have so changed and had so changed before 1901 and since 1868 that a second track upon said street would be a great injury and detriment to public travel and traffic, and will be destructive to its use as a public highway and greatly obstruct the business interests of said city and its citizens and be a source of increased danger to the public. That the construction and the use of a second track on said street between the St. Joseph River and General Taylor Street will necessarily destroy said street as a public thoroughfare and will deprive the abutting owners thereon of reasonable access to their property. That in view of these facts the common council of the defendant city on October 14, 1901 repealed so much of Section Three aforesaid as provided for the construction of a double track on Division Street and the other defendants have refused to permit said additional track to be laid, which are the acts complained of in the plaintiff's complaint.

Wherefore defendants say, that all right to lay any additional track on said street within the limits aforesaid ought to be
53 deemed to have been abandoned by said plaintiff.

FRANK DUNNAHOO,
City Attorney.
HUBBARD AND HUBBARD,
F. E. OSBORN AND
W. A. McVEY,
Attys. for Defendants.

5—81

And afterward, towit: on the 21st day of October 1904 the same being the 23rd juridicial day of the September Term, 1904, of said court the following further proceedings were had in the above entitled cause, towit:

GRAND TRUNK WESTERN RAILWAY CO.
VS.
CITY OF SOUTH BEND et al.

Now come the parties herein by counsel, and on motion the hearing of this cause is set specially for the first day of the next term of this court.

And afterward, towit: on the 30th day of June, 1905, the same being the 47th juridicial day of the May Term, 1905 of said court the following further proceedings were had in the above entitled cause, towit

THE GRAND TRUNK WESTERN RY. CO.
VS.
THE CITY OF SOUTH BEND et al.

Answer Withdrawn.

Now come the parties by counsel and the defendants withdraw their answer herein and each of said defendants now file their separate demurrers in these words, towit:

Separate Demurrers Filed.

STATE OF INDIANA,
County of Laporte, ss:

In the Laporte Circuit Court, May Term, 1905.

54 THE GRAND TRUNK WESTERN RAILWAY COMPANY
VS.
THE CITY OF SOUTH BEND et al.

Separate Demurrers of the City of South Bend.

The City of South Bend, defendant in the above entitled cause, demurs to each paragraph of the amended complaint herein filed, and for cause says that neither paragraph states facts sufficient to constitute a cause of action against this defendant.

HUBBARD AND HUBBARD,
FRANK DUNNAHOO,
OSBORN & McVEY,
Att'ys for Def't.

STATE OF INDIANA,
County of Laporte, ss:

In the Laporte Circuit Court, May Term, 1905.

THE GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Separate Demurrer of Edward Fogarty.

Edward Fogarty, defendant in the above entitled cause, as mayor of the city of South Bend, Indiana, demurs to each paragraph of the amended complaint herein filed, and for cause says that neither paragraph states facts sufficient to constitute a cause of action against him.

HUBBARD & HUBBARD,
FRANK DUNNAHOO,
OSBORN & McVEY,
Att'ys for Deft.

55 STATE OF INDIANA,
County of Laporte, ss:

In the Laporte Circuit Court, May Term, 1905.

THE GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Separate Demurrer of Peter Koczrowski.

Peter Kpczrowski, defendant in the above entitled cause, demurs to each paragraph of the amended complaint herein filed, and for cause says that neither paragraphs state facts sufficient to constitute a cause of action against him.

HUBBARD & HUBBARD,
FRANK DUNNAHOO,
OSBORN & McVEY,
Att'ys for Deft.

STATE OF INDIANA,
County of Laporte, ss:

In the Laporte Circuit Court, May Term, 1905.

THE GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Separate Demurrer of James H. Loughman.

James H. Loughman, defendant in the above entitled cause, demurs to each paragraph of the amended complaint herein filed,

and for cause says that neither paragraphs state facts sufficient to constitute a cause of action against him.

HUBBARD & HUBBARD,
FRANK DUNNAHOO,
OSBORN & McVEY,
Att'ys for Def't.

56 STATE OF INDIANA,
County of Laporte, ss:

In the Laporte Circuit Court, May Term, 1905.

THE GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Separate Demurrer of Hugh T. Montgomery.

Hugh T. Montgomery, defendant in the above entitled cause, demurs to each paragraph of the amended complaint herein filed, and for cause says that neither paragraphs state facts sufficient to constitute a cause of action against him.

HUBBARD & HUBBARD,
FRANK DUNNAHOO,
OSBORN & McVEY,
Att'ys for Df't.

STATE OF INDIANA,
County of Laporte, ss:

In the Laporte Circuit Court, May Term, 1905.

THE GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Separate Demurrer of Henry F. Elbel.

Henry F. Elbel, defendant in the above entitled cause demurs to each paragraph of the amended complaint herein filed, and for cause says that neither paragraphs state facts sufficiently to constitute a cause of action against him.

HUBBARD AND HUBBARD,
FRANK DUNNAHOO,
OSBORN & McVEY,
Atty's for Def't.

57 STATE OF INDIANA,
County of Laporte, ss:

In the Laporte Circuit Court, May Term, 1905.

THE GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Separate Demurrer of John C. Schrayer.

John C. Schrayer, defendant in the above entitled cause, demurs to each paragraph of amended complaint herein filed, and for cause says that neither of said paragraphs state facts sufficient to constitute a cause of action against him.

HUBBARD & HUBBARD,
FRANK DUNNAHOO,
OSBORN & McVEY,
Att'ys for Def't.

STATE OF INDIANA,
County of Laporte, ss:

In the Laporte Circuit Court, May Term, 1905.

THE GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Separate Demurrer of August Stenckle.

August Stecnkle, defendant in the above entitled cause, demurs to each paragraph of the amended complaint herein filed, and for cause says that neither paragraphs state facts sufficient to constitute a cause of action against him.

HUBBARD & HUBBARD,
FRANK DUNNAHOO,
OSBORN & McVEY,
Att'ys for Def't.

58 STATE OF INDIANA,
County of Laporte, ss:

In the Laporte Circuit Court, May Term, 1905.

THE GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Separate Demurrer of George Whiteman.

George Whiteman, defendant in the above entitled cause demurs to each paragraph of the amended complaint herein filed, and for

cause says that neither of said paragraphs state facts sufficient to constitute a cause of action against him.

HUBBARD & HUBBARD,
FRANK DUNNAHOO,
OSBORN & McVEY,
Att'ys for Def't.

STATE OF INDIANA,
County of Laporte, ss:

In the Laporte Circuit Court, May Term, 1905.

THE GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Separate Demurrer of Leo M. Kucharski.

Leo M. Kucharski, defendant in the above entitled cause, demurs to each paragraph of the amended complaint herein filed, and for cause says that neither paragraphs state facts sufficient to constitute a cause of action against him.

HUBBARD & HUBBARD,
FRANK DUNNAHOO,
OSBORN & McVEY,
Att'ys for Def't.

59 STATE OF INDIANA,
County of Laporte, ss:

In the Laporte Circuit Court, May Term, 1905.

THE GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Separate Demurrer of Michael J. Sommers.

Michael J. Sommers, defendant in the above entitled cause, demurs to each paragraph of the amended complaint herein filed, and for cause says that neither paragraphs state facts sufficient to constitute a cause of action against him.

HUBBARD & HUBBARD,
FRANK DUNNAHOO,
OSBORN & McVEY,
Att'ys for Def't.

STATE OF INDIANA,
County of Laporte, ss:

In the Laporte Circuit Court, May Term, 1905.

THE GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Separate Demurrer of Henry Hartzer.

Henry Hartzer, defendant in the above entitled cause, demurs to each paragraph of the amended complaint herein filed, and for cause says that neither paragraphs states facts sufficient to constitute a cause of action against this defendant.

HUBBARD & HUBBARD,
FRANK DUNNAHOO,
OSBORN & McVEY,
Att'ys for Def't.

60 STATE OF INDIANA,
County of Laporte, ss:

In the Laporte Circuit Court, May Term, 1905.

THE GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Separate Demurrer of the Board of Public Works of the City of South Bend.

The Board of Public Works of the City of South Bend, demurs to each paragraph of the amended complaint herein filed, and for cause says that neither paragraph states facts sufficient to constitute a cause of action against it.

HUBBARD & HUBBARD,
FRANK DUNNAHOO,
OSBORN & McVEY,
Att'ys for Def't.

STATE OF INDIANA,
County of Laporte, ss:

Demurrer of Members of Board of Public Works.

In the Laporte Circuit Court, May Term, 1905.

THE GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Separate Demurrer of William A. McInerny, &c.

William A. McInerny, John W. Paperzinski and Edward F. Nicar, constituting and composing the board of Public works of the city of South Bend, Indiana, defendant in the above entitled cause, demur to each paragraph of the amended complaint herein filed, and for cause say that neither paragraph states facts sufficient to constitute a cause of action against the said defendants.

HUBBARD & HUBBARD,
FRANK DUNNAHOO,
OSBORN & McVEY,
Att'ys for Def't.

61 STATE OF INDIANA,
County of Laporte, ss:

In the Laporte Circuit Court, May Term, 1905.

THE GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Separate Demurrer of William A. McInerny.

William A. McInerny, defendant in the above entitled cause, demurs to each paragraph of the amended complaint herein filed, and for cause says that neither paragraphs state- facts sufficient to constitute a cause of action against him.

HUBBARD & HUBBARD,
FRANK DUNNAHOO,
OSBORN & McVEY,
Att'ys for Def't.

STATE OF INDIANA,
County of Laporte, ss:

In the Laporte Circuit Court, May Term, 1905.

THE GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Separate Demurrer of John W. Paperzinski.

John W. Paperzynski, defendant in the above entitled cause, demurs to each paragraph of the amended complaint herein filed, and for cause says that neither paragraph state- facts sufficient to constitute a cause of action against him.

HUBBARD & HUBBARD,
FRANK DUNNAHOO,
OSBORN & McVEY,
Att'ys for Def't.

62 STATE OF INDIANA,
County of Laporte, ss:

In the Laporte Circuit Court, May Term, 1905.

THE GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Separate Demurrer of Edwin F. Nicar.

Edwin F. Nicar, defendant in the above entitled cause, demurs to each paragraph of the amended complaint herein filed, and for cause says that neither paragraphs state- facts sufficient to constitute a cause of action against him.

HUBBARD & HUBBARD
FRANK DUNNAHOO,
OSBORN & McVEY,
Att'ys for Def't.

STATE OF INDIANA,
County of Laporte, ss:

In the Laporte Circuit Court, May Term, 1905.

THE GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Separate Demurrer of James L. McWeeney.

James L. McWeeney, defendant in the above entitled cause, demurs to each paragraph of the amended complaint herein filed,

and for cause says that neither paragraph state- facts sufficient to constitute a cause of action against him.

HUBBARD & HUBBARD,
FRANK DUNNAHOO,
OSBORN & McVEY,
Att'ys for Def't.

63 And afterwards, towit, on the 19th day of October, the same being the 22nd juridical day of the September Term, 1905, of said court the following further proceedings were had in the above entitled cause, towit:

THE GRAND TRUNK WESTERN RY. CO.
VS.
CITY OF SOUTH BEND et al.

Come now the parties herein by counsel and this cause is continued.

And afterwards, towit: on the 24th day of November, 1905, the same being the 53- juridical day of September term, 1905, of said court, the following further proceedings were had in the above entitled cause, towit:

THE GRAND TRUNK WESTERN RAILWAY COMPANY
VS.
THE CITY OF SOUTH BEND et al.

Demurrer Sustained.

Come the said parties by their counsel and the Court now sustains each separate demurrer filed by each of the defendants herein, to each of which separate ruling- of the Court as to each of said demurrers, and as to each paragraph the plaintiff at the time excepts.

Plaintiff Excepts.

And afterwards, towit: on the 2nd day of February, 1906, the same being the 53rd juridical day of the December Term, 1905, the following further proceedings were had in the said above entitled cause, towit:

THE GRAND TRUNK WESTERN RAILWAY COMPANY
VS.
THE CITY OF SOUTH BEND et al.

Form.

64 Now again come the parties by counsel, and plaintiff fails to amend its complaint, and refuses to plead further.

Judgment.

It is therefore ordered, adjudged and decreed that the plaintiff takes nothing by its complaint and the defendants go hence acquit and that defendant recover from plaintiff their costs herein laid out and expended assessed at the sum of — Dollars.

And plaintiff now prays an appeal to the Appellate Court of this State which is granted on its filing its appeal bond conditioned for the due prosecution of its appeal within thirty days from this date in the penal sum of Two Hundred Dollars, with Andrew Anderson as surety thereon.

Appeal Granted.

And afterwards, towit: on the 24th day of February, 1906, the same being a day in vacation after the December Term, 1905, of said Court, the following further proceedings were had in said cause, towit:

THE GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Præcipe Filed.

Comes now, this 24th day of February, 1906 the said plaintiff by Anderson, Parker & Grabill, its attorneys, and files in the office of the Clerk its præcipe, in these words, to wit:

STATE OF INDIANA,
Laporte Circuit Court:

GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
CITY OF SOUTH BEND.

Præcipe.

To the Clerk of the Laporte Circuit Court:

You are hereby directed to make out and certify a com-
65 plete transcript of the amended complaint and of all the papers, orders, and entries of record filed or made in the above entitled cause subsequent to the filing of such complaint for use on appeal by the plaintiff to the Appellate Court of this State.

ANDERSON, PARKER & CRABILL.
Attorneys for Plaintiff.

Done in Clerk's Office, this 24th day of February, 1906.

GEORGE LINK,
Clerk of the Laporte Circuit Court.

66 *Clerk's Certificate.*

STATE OF INDIANA,
County of Laporte, ss:

I, George Link, Clerk of the Laporte Circuit Court within and for the aforesaid county and state, *to* hereby certify that the above and foregoing transcript contains true and complete copies of the amended complaint, papers, orders and entries of record filed or made in the above entitled cause subsequent to the filing of the amended complaint, as ordered by the above and foregoing præcipe.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Laporte, this 17th day of March, 1906.

[SEAL.] GEORGE LINK,
Clerk of the Laporte Circuit Court.

67 And afterwards towit: on the 15th day of February, 1907, the same being the 71st Judicial Day of the November Term, 1906, of said Supreme Court, the following pleas and proceedings were had in said cause to-wit:

Come now the parties by their attorneys and this cause is submitted to the said Supreme Court for judgment and decision as provided by the act of the General Assembly of the State of Indiana, approved April 13, 1885, and the rules of said Supreme Court adopted in relation thereto.

And afterwards towit: on the 2nd day of April, 1907, the same being the 110th Judicial Day of the November Term, 1906 the following further pleas and proceedings were had herein.

Comes the appellant by attorneys and files its petition for an extension of time to file brief herein (H. I.).

And afterwards towit: on the 3rd day of April, 1907, the same being the 111th Judicial Day of the November *day*, 1906, the following further pleas and proceedings were had herein.

The Supreme Court being fully advised in the premises grants the petition of appellant heretofore filed for thirty (30) days from April 15, 1907.

And afterwards towit: on the 14th day of May, 1907, the same being the 146th Judicial Day of the November *day* Term 1906, the following further pleas and proceedings were had herein.

Comes now the appellant by attorneys and files its brief (8) in the words and figures following towit (H. I.).

And afterwards towit: on the 10th day of June, 1907 the same being the 13th Judicial Day of the May Term, 1907, the following further pleas and proceedings were had herein.

Comes now the appellees by their attorneys and files their brief (8) in the words and figures following towit (H. I.).

And afterwards towit: on the 28th day of June, 1907 the same being the 29th Judicial day of the May Term, 1907, the following further pleas and proceedings were had herein.

Comes now the appellant by its attorneys and files it- reply brief (8) in the words and figures following (H. I.).

68 And afterwards towit on the 23rd day of November 1909, the same being the 2nd Judicial Day of the November Term, 1909, the following further pleas and proceedings were had herein.

Comes now the parties by their attorneys and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by Myers, J. which opinion is in the words and figures following towit:

69 THE STATE OF INDIANA:

In the Supreme Court, November Term, 1909.

On the 23rd Day of November, Being the 2nd Judicial Day of said November Term, 1909.

Hon. John V. Hadley, Chief Justice.
Hon. Leander J. Monks,
Hon. Quincy A. Myers,
Hon. James H. Jordan,
Hon. Oscar H. Montgomery,
Justices.

No. 20981.

In the case of—

GRAND TRUNK *and* WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Appealed from the Laporte Circuit Court.

Come the parties by their Attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by

MYERS, *J.:*

70 This action was brought by appellant against the City of South Bend and certain of its officers, to enjoin them from interfering with the appellant in its attempt to lay a second track through a portion of the City of South Bend, on and along the center of Division street.

Suit was originally commenced in the St. Joseph Circuit Court from which a change of venue was taken to the La Porte Circuit Court. Amended complaint in two paragraphs. Appellee's separate and several demurrers for want of sufficient facts were sustained

to each of the amended paragraphs of the complaint. The appellant refused to plead over, and judgment was rendered against appellant for costs.

The errors assigned are the sustaining of each, and all the demurrers to the amended complaint.

The complaint, or so much of its substance as is necessary for the basis of this opinion, is as follows: After the preliminary allegations, it appears from the first paragraph of the complaint that on or about the 24th day of October, 1866, the City of South Bend, by William G. George, Mayor, and fourteen individuals, executed articles of association to incorporate for the purpose of building, owning and operating a railroad to be known as the "Peninsular Railroad Company of Indiana" from the North line of the State of Indiana * * * through South Bend, and thence * * * in the direction of Chicago, * * * said proposed road to be about Eighty five miles long. * * * The articles of association were filed on the 10th day of December, 1866. * * * That on the 2nd day of March 1868, the common council of the City of South Bend passed and enacted an ordinance numbered 62, whereby consent, permission and authority was given, granted and duly vested in the Peninsular Railroad Company of Indiana to construct and maintain a track for its said railroad within the City of South Bend upon the following terms, to-wit: "Commencing at the Eastern limits of said City at the East end of a twenty-foot street laid out and dedicated on the South side of Samuel Cottrell's Addition to the Town of Lowell, or at a point on said Twenty-foot street that the company might see proper to adopt, thence across the St. Joseph river to the Eastern end of the extension of Division street and its extension in said City so far as the said company may desire, crossing all intermediate streets and alleys and to run locomotive cars
71 and trains over said road so far as might be necessary for the conducting of the business of said company." * * * That no more than one track for such road should be laid across any street of said City without the previous assent of the Common Council of said City, except only the privilege "which is hereby granted to lay down a double track across the bridge over the St. Joseph river, and from the Western terminus of said bridge to General Taylor street in said city subject to the conditions hereinbefore contained," etc. That in the year 1881 the said Chicago, etc. Railway Company which company was then operating and maintaining said railroad, desired to acquire and perfect its title to the land used by it, and which it would be necessary to use in operating its road, as a right of way through Division Street in said city, and to settle with, and compensate the owners of said land for their interest in the central portion of the street so taken, * * * did in accordance with the statutes of the State of Indiana, appropriate for its use, as and for a railroad track, a strip of land eighteen (18) feet wide on the street in question. The plaintiff avers that it is now the owner in fee of the said right of way eighteen feet wide, extending from the West end of the bridge crossing the St. Joseph river to Taylor street in the City of South Bend, a distance of about 200 rods;

that since the year 1871, this company and its predecessors aforesaid, have openly, continuously and notoriously occupied the center of Division street with its said railroad from the West end of said bridge, to Taylor street and have always claimed the right to lay down said double track across the St. Joseph river, and along said Division street from the West end of said bridge to the center of General Taylor street aforesaid, whenever the requirements of their business should make it necessary, and have expended large sums of money in the maintenance of said track, and have complied with the conditions required of them by said ordinance, with the full knowledge and acquiescence of the city of South Bend and the authorities thereof. That on the first day of January, A. D. 1881, said Chicago and Grand Trunk Railway Company did lay down a double track on Division street between the St. Joseph river and Michigan street, which lies five squares East of, and parallel with Taylor street, and it and its assigns have ever since used and plaintiff still uses the same. It is further averred that on the fourteenth day of October 1901, the City of South Bend through its Common Council assumed by ordinance to repeal so much of the ordinance granting the
72 right to maintain a railroad in Division street as gives the right to a second track in that street from Michigan street to General Taylor street, and the City now sets up, and claims, that the action of the Common Council was effective in that behalf, and that thereby the plaintiff's right to said second track was lawfully revoked, and has forcibly prevented putting down such second track. It is also alleged that the street is eighty-two and one-half feet wide, and that the obstruction of the general public in its use of the street by passing trains will be much less when the two tracks are used than it is now, when all trains both ways, have to pass over a single track, and that there is ample space thereon for general travel, and for said double track.

The second paragraph of complaint is the same as the first so far as any question involved in this appeal is concerned. The only material difference is as to the manner of acquisition by appellant, of the rights, franchises, and property of the original Company, and no question is raised by appellees as to that matter; there is the additional allegation in the second paragraph that appellant supposing its title in all respects had kept up and maintained its line through Division street, and had expended in the whole line of railroad, one million dollars.

The questions which need be here decided are, First, whether the appellant as successor to the rights and privileges of the original Peninsular Railroad Company of Indiana, acquired, by virtue of the grant contained in Ordinance No. 62 of the Common Council of the City of South Bend, the right to lay an additional track on Division street between Michigan and Taylor streets, and Second, whether if it obtained that right under the grant by that ordinance, the City could by another ordinance revoke so much of the grant as permitted the laying of an additional track on that portion of Division street.

If the ordinance contained such a grant, and the City had no

power to revoke it, this judgment must be reversed. If it has not such right, or if there being a right to lay an additional track the City had the power to revoke this right, the judgment must be affirmed.

The Legislature, primarily, has control over streets, as well as of other public highways; they are arteries of the State. State ex rel. v. Board, 170 Ind. 595, 609; Cones v. Board, 137 Ind. 404.

73 And this governmental power of control, can not be surrendered, or contracted away; it is a part of the police power, which can not be alienated, or placed beyond municipal control. Northern Pac. Co. v. Minnesota, 28 S. C. R. 341, and cases cited. State v. Barrett, 87 N. E. R. 7; Indiana Co. v. Calvert, 168 Ind. 321; Vandalia Co. v. State, 166 Ind. 219; Cleveland etc. Co. v. Harrington, 131 Ind. 420; Stone v. Mississippi, 101 U. S. 814; Beer Co. v. Massachusetts, 97 U. S. 25; Northwestern Co. Hyde Park, 97 U. S. 659; Leavenworth v. Phillips, 73 Pa. R. 97; Elliott on Railroads, 2nd Ed. Sec. 1082; Elliott on Roads & Streets, Secs. 741, 742, 788.

But the Legislature may delegate the power of control over its streets to a City or Town. State ex rel. v. Board, *supra*; New Castle v. Lake Erie etc. Co. 155 Ind. 18, 23; Burkam v. Ohio etc. Co. 122 Ind. 344;

The act in force when the ordinance in question was enacted, reads as follows: "The Common Council shall have exclusive power over the streets, highways, alleys, and bridges within such City, etc." R. S. 1881 Sec. 3161. This section was first amended in 1891, Acts 1891, p. 122, and much specification added.

Under this power of exclusive control, a delegated power, or trust, if the Legislature can not surrender, alienate or contract away its legislative functions, its governmental and police powers, it of course can not delegate the right of surrender, or alienation.

It is not an open question in this State that Cities are delegated the power of permitting the laying of railroads in streets; but it is the grant of the State. Town of Newcastle v. Lake Erie Co. 155 Ind. 18; Burkam v. Railway Co. 122 Ind. 344; Kistner v. City, 100 Ind. 210; Tate v. Railroad Co. 7 Ind. 479; Haslett v. New Albany Co. 7 Ind. App. 603; City Co. v. Citizens Co. 166 U. S. 551;

The question of the character, and measure of the grant is a different one. "In so far however as such control consists in regulation merely, and is demanded by considerations of public health, or safety, it is now well understood that a grant does involve such surrender, since it is impliedly subject to such reasonable safety regulations, as may be imposed from time to time. The grant may surrender to some extent the previous liberty of common use of

74 the public property, but it does so only for the purpose of substituting other, and presumably more valuable public facilities."

It is justifiable, if at all, upon the theory that a railroad is in some sense a public highway, a means of rapid travel. Toledo etc. Co. v. Pence, 68 Ill. 524; Clark v. Chicago, etc. Co. 127 Mo. 197; Sharpless v. Philadelphia, 21 Pa. St. 147; Davis v. Ramsey County, 18 Minn. 482; Beekman v. Saratoga, etc. Co. 3 Paige (N. Y.) 45;

Texas, etc. Co. v. Sutor, 56 Tex. 496; Freund on Police Powers, Sec. 575.

It is settled in many jurisdictions and is accepted in this state, that an ordinance imposing terms and conditions for the use of streets, when accepted, becomes a binding contract, but not to the extent that the police powers are surrendered, and the distinction in the cases will be found to lie in the subject-matter; that is, that such contracts are inviolable as applied to the business concerns of cities, but are subject to regulation when the public interest intervenes. As marking this distinction on the one hand are: The City v. Consumers Co. (1894), 140 Ind. 107; Meyer v. The Town, 162 Ind. 165; City v. Gas Co. 66 Ind. 396.

On the other: Western, etc. Co. v. Citizens Co. 128 Ind. 525; Muncie Co. v. City (1902), 160 Ind. 97, 102; City v. Rushville, etc. Co. (1904), 164 Ind. 162; City v. Nobelsville Co. (1901), 157 Ind. 162, 169.

The question is as to the nature of the contract, the character of the legislation; the implied conditions, and the public policy which necessarily enter into it.

In Dillon on Municipal Corporations, Sec. 715, in commenting upon Davis v. The Mayor, 14 N. Y. 505, it is said: "The judgment of the court rests upon the sound principle that the powers of a corporation in respect to the control of its streets are held in trust for the public benefit, and cannot be surrendered, or delegated by contract to private parties, and hence the resolution of the City Council authorizing private persons to control and operate a railroad upon certain terms, without power of revocation, and without limit as to time, was not a license, or act of legislation, but a contract; void, however, because if valid, it would deprive the corporation of the control, and regulation of its streets." The right to use a highway or street is taken, affected with the implied condition that the highway or street shall not be used in such manner as to destroy its proper, and legitimate use by the public at all times. Vandalia Co. v. State, 166 Ind. 219; Des Moines Co. v. Des Moines Co. 73 Ia. 513; Baltimore, etc. Co. v. Baltimore, 166 U. S. 657; Railroad Co. v. Richmond, 96 U. S. 521; People v. Rich. 64 Cal. 74; Commonwealth v. Frankfort, 92 Ky. 149; Detroit v. Mills, 85 Mich. 634; Schulenberg v. St. Louis Co. 129 Mo. 455; Lockwood v. Wabash Co. 122 Mo. 86; Watson v. Robberson Ave. Co. 69 Mo. App. 548; Newport News Co. v. Hampton Co. 102 Va. 795; Washington, etc. Co. v. City, 98 Va. 344; Richmond, etc. Co. v. City, 67 Va. 83; Mahady v. Buchwick Co. 91 N. Y. 148; Dooley Block v. Salt Lake Co. 9 Utah 31; S. C. 24 L. R. A. 610; Wilder v. Aurora, etc. Co. 216 Ill. 493; Ligare v. Chicago, 139 Ill. 46; Williams v. Electric Co. 41 Fed. 556; C. B. & Q. Co. v. Illinois, 200 U. S. 561; Union etc. Co. v. U. S. 204 U. S. 364; New Orleans v. Drainage Com. 197 U. S. 453. Funk v. St. Paul etc. Co. 61 Minn. 435; S. C. 29 L. R. A. 208; 52 A. S. R. 608; Rische v. Texas Co. 27 Tex. Civ. App. 33; Schaff v. Cleveland etc. Co. 66 Oh. St. 215; Lake Roland Co. v. The Mayor, 77 Md. 352; Linden etc. Co. v. Milwaukee Co. 107 Wisc.

493, 511; City v. Chicago, etc. Co. 34 L. R. A. 184; Elliott on Roads & Streets, Secs. 758, 760, 857.

"All parties dealing with a sovereign power, or any of its functionaries in the exercise of governmental power, the subject of which pertains to government, do so knowing that it can not contract away the power conferred for self protection or self preservation. The rule therefore that the Legislature can pass no law impairing the obligation of contracts, does not apply to parties dealing with a department of government, concerning the future exercise of powers conferred for public purposes by legislative acts, where the subject matter of the contract is one which affects the safety, and welfare of the public." Leavenworth v. Phillips, 73 Pac. R. 97; Northern Pac. Co. v. Minnesota, supra; Jackson, etc. Co. v. Interstate etc. Co. 24 Fed. 306; Cincinnati etc. Co. v. Connersville, 170 Ind. 316; New York v. Second Ave. Co. 32 N. Y. 261; N. Y. etc. Co. v. Bristol, 151 U. S. 556;

That such contracts are not mere private, or purely private, contracts, is pointed out in the case of People v. Suburban Co. 178 Ill. 594; S. C. 49 L. R. A. 650;

"The right of municipal corporations to property in lands,
76 and its usual incidents, and to create ferries and railroad franchises, are quite distinct, and separate from the duty as legislatures, having authority to pass ordinances for the control and government of persons, and interests within the city limits. The latter are powers held in trust, as all legislative powers are, to be used and exercised for the benefit and welfare of the whole community, while the former are property in the ordinary sense, to be acquired and conveyed in the same manner as natural persons acquire and convey property." Mayor v. Second Ave. Co. supra.

"Corporations which receive franchises from the State, or from municipalities duly authorized to grant the same, take the granted privilege subject to the power of the State to require them to at all times do whatever may be necessary for the health, safety, and welfare of the community. No grant can divest the sovereignty of the authority to enact measures for this purpose." Town of Westbrook's Appeal 57 Conn. 95.

In Washington, etc. Co. v. Alexandria, 98 Va. 344; S. C. 36 S. E. R. 385, it was held that the power of a city to control and regulate its streets is an inherent, and continuing power, to be exercised as, and whenever the City Council may think proper, subject only to the limitations that it must act in good faith, and that the regulation must be reasonable, and not imposed arbitrarily, or capriciously, the presumption being in favor of the propriety, and validity of what the city has directed to be done. This case was approved in Newport News Co. v. Hampton, etc. Co. 102 Va. 795, following the case of Richmond etc. Co. v. The City of Richmond, 67 Va. 83, which latter case was affirmed on appeal to the United States Supreme Court, 96 U. S. 521, where the City of Richmond enacted an ordinance prohibiting the use by a railway company of steam engines on Broad street in that City, though the company had so used the street for more than forty years; the claim being made to continue such use under

its contract with the City, and that the prohibiting ordinance impaired vested rights, and deprived the company of its property without due process of law, both of which contentions are denied. In Baltimore, etc. Co. v. Baltimore, 166 U. S. 673, it was held that the right of a street railway company under an ordinance to lay tracks in the streets, is subject to reasonable regulation by subsequent ordinances as to the use of the streets, and that although a street railway company had been granted a franchise to lay a double
77 track in a street, a subsequent ordinance restricting the right to the use of a single track was not an unreasonable restriction of the company's rights, or a material modification of the prior ordinance, and that a failure to provide any compensation to the company for taking up one track where it had laid a double track, after notice by the city authorities to permit but one track on the street, did not make the ordinance unreasonable.

In Snouffer v. Chicago, etc. Co. 118 Iowa 287, the ordinance authorizing the laying of a track in a street had been in force six years, and had been made avail of as to other streets, but no track had been laid on the particular street, when the ordinance was repealed, and it was held that while the right of control can not be exercised arbitrarily, or unreasonably, the council could not pass an irrevocable ordinance, on the ground that they are trustees for the public, and can not abridge their legislative powers. The case is an instructive one, and strongly in point here. In the case at bar, the ordinance had been in force over 38 years, without any avail being made of it, or any money expended with a view to double tracking, so far as any allegation of the complaint discloses.

The learned counsel for appellant directs our attention to the cases of Africa v. The Board, (1895) 70 Fed. 729; & Peoples Co. v. Baldwin (1880) 14 Phila. 231, to which we add Hestonville Co. v. Phila. 89 Pa. 210 in which it is held that an ordinance accepted is in no degree revocable, and that the grantee is not required to exercise all the powers conferred, from the beginning.

The precise reverse of the Africa case was held in Logansport Co. v. Logansport (1902) 114 Fed. 688; Citizens Co. v. City Co. 64 Fed. 647 and Citizens Co. v. City Co. 56 Fed. 746.

The better reasoning and the immense weight of authority is against the rule in the Africa case, and the other cases cited.

The causes seem however to have been disposed of from the purely contractual view, as the police power seems not to have been invoked, referred to, or considered. Our cases hold that cities can not by contract surrender any of their legislative, or discretionary powers confided to them for the public good, or held in trust for the public, and the great weight of authority is to the same effect. City of New Albany vs. New Albany Co. (1909) 87 N. E. 1084. Indiana
78 Co. v. Calvert, 168 Ind. 321; Vandalia Co. v. The State, 166 Ind. 219; Schipper v. The City, 121 Ind. 154; City v. Gleason, 91 Ind. 566; Northern Pac. Co. v. Minnesota, supra; Union etc. Co. v. U. S. supra; C. B. & Q. Co. v. Illinois, supra; New Orleans Co. v. Drainage Com., supra; Baltimore etc. Co. v. Baltimore (166 U. S. 673; New York Co. v. Bristol, 151 U. S. 556; Lake Roland Co. v.

Baltimore, 77 Md. 352; Town v. Rutland Co. 52 At. R. 1057; Thrope v. Railway Co. 27 Vt. 140; Binninger v. City 127 N. Y. Supp. 199; S. C. 69 N. E. R. 390; Gas Light etc. Co. v. Columbus, 50 Oh. St. 65.

An instructive case is that of Wabash etc. Co. v. Defiance 167 U. S. 88. In 1887 an ordinance was enacted authorizing the railway company to construct two overhead bridges in the City of Defiance which it did at a cost of $2300.00; in 1893 the City passed ordinances to lower the grade of the streets to the grade of the railway, by which a steep incline to the tracks on each side would be produced; the company attacked the validity of these ordinances on the ground that dangerous crossings would be produced, pointing out in the bill with great particularity the dangers to be encountered thereby, to its passengers and the public. The language of the Ohio statute as to the control of streets by cities is very similar to our own, and upon a full review of the cases the court held that the power to change the grade of the streets, and require conformity to them is a continuing one, and one that can not be alienated, or the subject matter, when the public are affected, be withdrawn from governmental regulation; the cities can not disable themselves from performing their legislative or public functions.

The case of Vandalia R. R. Co. v. South Bend, 166 Ind. 210, is directly in point upon the proposition that the ordinance is not wholly contractual in character, but legislative, and that it is not of such contractual character that it passed beyond control, or that the rights of the public, and the duties of the railroad company can be divested, simply because previous contrary action has been taken, citing Indianapolis, etc. Co. v. The State, 37 Ind. 489. To the same effect is Chicago, etc. Co. v. Nebraska, 170 U. S. 57.

The apparent conflict between the cases touching the character, and force of city ordinances with respect to their being licenses, or easements, or when acted upon, becoming contracts, and their inviolability, has grown out of the failure in all cases, to distin-
79 guish between the legislative, or governmental powers, on the one hand, as applied to, or affecting the police power, or in which the latter is involved, and the administrative powers with respect to the private, or proprietary rights, and interests, or business, or the other, or the dual capacity in which municipal corporations act. Neither is it a distinction readily drawn, and in each case must inhere in the subject matter.

Such contracts are necessarily legislative in the sense that the power primarily inheres in the Legislature, for the Legislature has the authority to grant railroads the right to lay tracks in streets without the consent, or over the objection of municipalities if it sees fit. Cook v. Chicago Co. 83 Ia. 278; Ingram v. Chicago Co. 38 Ia. 669; Chicago etc. Co. v. Mayor of Newton, 36 Ia. 299; City of Cedar Rapids Co. 24 Ia. 455; Borough v. Evergreen Co. 131 Pa. St. 1; Elliott on Railroads Sec. 1079.

So far then, as it is legislative, it is so in conferring the power, and with respect to legislative matters, but the distinction must be kept in mind between the power thus conferred, and the purely admin-

istrative, proprietary, or business powers. This distinction is referred to in the City v. Gas Co. 66 Ind. 396, where this court said, "This power to legislate within the authority delegated to them by law, is distinct from the power to contract, although exercised by the same corporation. They can not by contract, delegate, or restrict their legislative power, nor can they, merely by their legislative power, make a contract. These two powers need not be confounded. The exercise of the legislative power requires the consent of no person except those who legislate, while it is impossible to make a contract without the consent of another or others." As applied to the case there under consideration it is clearly manifest that it was a purely administrative contract affecting the economic, or business, or administrative concerns of the City, and in no sense involving its legislative, or police concerns, as affecting the health, safety or convenience of its citizens. The distinction is again affirmed in Meyer v. The Town, 162 Ind. 165, where it is held that in granting a franchise to use the "streets, alleys and public places" to furnish heat, light, water, telephone and etc., it exercises a legislative power. But when the town or city enters into a contract with a second party, having such franchise, * * * it exercises a business, and not a legislative power," citing numerous cases.

80 The dual character of an ordinance which in one document should do both these things, is well exemplified in the proposition just quoted. The doctrine is affirmed in The City v. Consumers & Ect. Co. 140 Ind. 107, and Indianapolis Co. v. The State, 37 Ind. 489.

Appellant urges that the cases of Lake Roland Co. v. The Mayor, 77 Md. 352, and Baltimore v. Baltimore, 166 U. S. 673, are not in point because as said "the State Court found and held that the power of the city council to amend or modify its ordinances was expressly retained in the statute authorizing the passage of such ordinances." We do not understand the court to so hold or declare, except in so far as that the power to legislate in the future is an inalienable and continuing power, to be exercised when, and as the necessity may arise, and that this is a reserve power in the Legislature, and in the City Council.

Cases involving the effect upon the abutting property, and individual rights of third parties are cited and relied upon, but they have no relevancy here, where the question is solely one in the public interest, and of power in the City Council, as trustee for the public.

It is alleged that the street is 82½ feet wide "and that the obstruction of the general public in its use of the street by passing trains will be much less when two tracks are used than it is now, when all trains both ways have to pass over a single track, and that there is ample space thereon for general travel, and for said double track." We think however that aside from the allegation that the street is 82½ feet wide, the allegation is a conclusion. The allegation that the street is 82½ feet wide includes the sidewalks. Drew v. Geneva, 150 Ind. 662, and cases cited; People v. Meyer, 56 N. Y. Supp. 1097; Martinovitch v. Wooley, 128 Cal. 141; Board v. Hayden, 13 Col. App. 36; Challis v. Parker, 11 Kan. 384.

We can not know the width of the sidewalks or of the roadway proper; we can not — how much space is required for the operation of one track, but we do know that it requires double, or for safety between the tracks, more than double space for two tracks. The allegation therefore that the obstruction will be less with two tracks than one, is not only a solecism, but the allegation if not a conclusion, is the allegation of a thing which necessarily could not be, and hence without force, and can not be regarded. Indiana etc. Co. v. Jamieson, 128 Ind. 574; Jones v. United States, 137 U. S. 202.

81 There are cases in which the question of the degree of obstruction has been the basis of the court's action; of this class is, Nagel v. Lindell Co. 167 Mo. 89, where the question arose between abutting owners, and the railway company.

These cases are contrary to the general doctrine that there is no power in municipalities to so restrict or obstruct the use of streets as to render them ineffective for the purpose of their creation. Ligare v. Chicago, 139 Ill. 46; Detroit v. Mills, 85 Mich. 634; Lockwood v. Wabash Co. 24 L. R. A. 516.

We are left without any guide on the question of the degree of the obstruction, but aside from that proposition, the question is one for the city to determine, and we can only interfere where the action is arbitrary, unreasonable, capricious or whimsical, and we find nothing in the case to indicate either. City v. Chicago etc. Co. supra; Vandalia Co. v. State, supra; Indiana Co. v. Calvert, 168 Ind. 321, and cases cited.

Nor is the fact without force, that no use was made of this claim of grant for more than 33 years, or until after the city had passed the repealing ordinance. It is argued that the grant was a continuing one, to be exercised when the necessities of appellant's business required a second track, but it may equally as well be argued that the requirement of the public in the interest of safety and accommodation in the use of the street for its primary purposes, demands a restricted use by appellant, as to which the legislative authority of the city is also a reserve, and continuing power, and one in the exercise of which, in the absence of fraud, or unreasonable, and arbitrary action, made to appear, the city council is the sole judge. Indiana Co. v. Calvert, supra; Gascho v. Sohl, 155 Ind. 417.

The case of Vandalia Co. v. State, supra, and cases there and herein cited, make the distinction which obtains here, viz; that Ordinance No. 62 whilst quasi contractual in the one characteristic of mutual assent, in its enactment, was not enacted in carrying on the business concerns, or the economic policy, or the administrative functions of the city, but was in fact, and in law, legislative; is impressed with public interests, and the public policy; the legislative power, and the inalienable character of this power, in subservience to the right to control and regulate the use of streets for the benefit of the public, in the administration of the re-

82 serve, and police power, and subject to such modification as the future necessities required; the grant was affected by

the public interest and was taken subject to the exercise of this power, and was not placed beyond municipal control; was ineffective as an irrevocable contract, and the restrictive ordinance was valid.

Other questions are urged which in view of our conclusions, are immaterial.

The judgment is affirmed.

83 And afterwards towit: on the 20th day of January, 1910, the same being the 52nd Judicial Day of the November Term, 1909, the following further pleas and proceedings were had herein.

Comes now the appellant by attorneys and files its petition and brief (8) for a rehearing herein which petition is in the words and figures following (H. I.)

And afterwards, towit: on the 29th day of March, 1910, the same being 109th Judicial Day of the November Term, 1909, the following further pleas and proceedings were had herein.

Comes now the appelle-s by their attorneys and file their brief (8) on the petition for a rehearing heretofore filed by appellant herein, which brief is in the words and figures following (H. I.)

And afterwards towit: On the 11th day of May, 1910 the same being the 147th Judicial Day of the November Term, 1909, the following further pleas and proceedings were had herein.

Come now the parties by their attorneys and the court being sufficiently advised in the premises overrules the petition for a rehearing heretofore filed herein by the appellant with an opinion pronounced by Meyers, J., in the words and figures following:

84 THE STATE OF INDIANA:

In the Supreme Court, November Term, 1909.

On the 11th day of May (1910), being the 147th Judicial day of said November Term, 1909.

Hon. John V. Hadley, Chief Justice.
Hon. Leander J. Monks,
Hon. Quincy A. Myers,
Hon. James H. Jordan,
Hon. Oscar H. Montgomery,
Justices.

No. 20981.

In the Case of

GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE CITY OF SOUTH BEND et al.

Appealed from the Laporte Circuit Court.

Come the parties by their Attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment

as follows, pronounced by Myers, J., petition for rehearing overruled.

85 The learned counsel for appellant have presented an able and exhaustive brief upon petition for a rehearing. They urge first, that the court overlooked their insistence upon the allegation of the complaint that the repealing ordinance is void, as violative of section 10, Art. 1, of the Federal Constitution, and Section 24, Art. 1, of the State Constitution, prohibiting the impairment of the obligation of contracts. They were not overlooked: On the contrary, they furnished the subject of the court's careful consideration, and the opinion seemed to be sufficiently explicit in itself, without pointing out the sections, to indicate the basis for it, as covering the question. We may here add however, as pertinent to the question, the proposition that the prohibition as to impairment of contract obligations, does not extend to subjects affecting the health, safety, or general welfare of the public. Chicago, etc. Co. v. Nebraska, 170 U. S. 557; Budd v. New York, 143 U. S. 517; Powell v. Penna. 127 U. S. 678; Barbier v. Connolly, 113 U. S. 27; Butchers Union v. Crescent City, 111 U. S. 746; Stone v. Mississippi, 101 U. S. 814; The Slaughter House Cases, 16 Wall. 36.

It is urged "that the Court misapprehended the force of the averments of the complaint, and that the fact alleged that a double track had been laid, and used for nearly thirty years in a portion of Division Street without complaint or inconvenience, is sufficient to show that Ordinance Contract 62 was not only authorized by statute, but that it was reasonable, and that the public interests, and public travel were fully, and adequately protected, and that the repealing ordinance was not only unreasonable, but wholly unnecessary." This insistence is made for the reason that the ordinance provides quite fully for the manner of operating trains, keeping up repairs on the tracks, keeping street crossings in repair, *and* etc. This however as we view it, is no answer to the proposition that all such grants as are here claimed, are subject to the exercise of the police power, which would operate irrespective of the contract, and two tracks may have long been maintained on some portion of Division Street, without inconvenience to the public, or without complaint; that establishes nothing as to the right, or power of the city to determine for itself that another portion would be obstructed, or the public inconvenienced; it may furnish an argument, but it presents no controlling fact.

86 It is next urged that we were in error in holding that there would necessarily be more obstruction with two tracks than with one, the argument being, "that it would necessarily require twice as long to pass a given number of cars or train loads over a given portion of a single track, than it does if the same volume of traffic is divided, and one half passes over one track, and one half over another parallel track at the same time." If that were the whole of the proposition there would seem to be force in it, but let us put a case: Suppose there are two tracks, and both are necessary to accommodate the present volume of traffic, than we might have the case of the street being occupied practically all the time by opposite

moving trains, increasing both the occupancy of the street longitudinally, and the crossings, and it is quite well known that safe clearance of two trains upon a double track requires from twenty to twenty two feet, to say nothing of the danger from teams or vehicles moving longitudinally, in close proximity to moving trains; granting that it is possible that two tracks may be laid within eighteen feet, so that trains will pass over them, still leaves the projection of cars on each side of at least eighteen inches, or three additional feet, which is more of an obstruction in a moving train than the two tracks would be in the width occupied by them, because of the danger of travel, from projecting, or falling matter, control of teams, and the like, and looking to the question of practicability as appellant insists, we can not say as a matter of law that two tracks would not be an obstruction of the primary use to which the street was dedicated but is a legislative question. Wabash Ry. Co. v. Defiance, 167 U. S. 88; Baltimore v. Baltimore Co. 166 U. S. 673; Chicago etc. Co. v. Whiting, (1894) 139 Ind. 296.

We still think that notwithstanding the allegation of the complaint that there will be less obstruction with two tracks than with one, necessarily can not be regarded as an allegation of a fact. Appellant's trains can be so scheduled that passing points can be arranged beyond the limits of a single track; it may be that the effect would be to require a different handling of trains from that which would be accomplished by two tracks, but we can not be guided or controlled by considerations of convenience, or inconvenience, when brought face to face with the conditions here disclosed.

It is claimed that the court has ignored the rule in White v. The Chicago & etc. Ry. Co. 122 Ind. 317. That case presented
87 the one question of damages to an abutting owner, and no question of the police, or legislative power of the city, nor any question as to the width of the street, or the degree of interference with its use, or the sufficiency of the unoccupied portion for the usual purposes of a street, was presented, or decided.

It is next urged that the ordinance attempts "to take away the right of plaintiff to use even the portion of the street already occupied by it under the consent given by the ordinance, with double tracks", and "that the opinion seems to go upon the theory that this ordinance repeals only the privileges to lay down a double track on the part of the street for which the privilege was given, on which the track was already laid." The brief on petition for rehearing is the first intimation of any claim that the ordinance seeks to take away the right to use the portion of the street now occupied by a double track. We do not mean to hold that there might not be such a right, but no such claim of right is asserted or intimated anywhere, prior to the filing of the brief on petition for rehearing. We recur to the complaint in which it is alleged that on the first day of January 1881 a double track was laid on Division Street between the St. Joseph River and Michigan Street, and has ever since been used by appellant, that the ordinance of October 14, 1901, attempted to repeal so *so* much of ordinance 62 as gives the right to a second

track in said street and that upon an attempt made by appellant October 6, 1902, to lay a track West on Division street to Taylor Street, it was prevented, and there is no pretense of an attempt to interfere with, or a claim of right to interfere with the double track now laid, and the prayed of the complainant is that appellees be 'enjoined from in any way hindering, or preventing the plaintiff from laying down said additional track as aforesaid", *and* etc. We were clearly correct in our theory that only the question of laying the additional track was involved.

"The public necessity of the exercise of the police power in any case is a matter addressed to the discretion of the legislature, but whether a given regulation is a reasonable restriction upon personal rights is a judicial question." Tiedeman on Police Powers section 214; Ladd v. Southern & etc. Co. 53 Tex. 172; Chicago, etc. Co. v. People, 67 Ill. 111; Toledo, etc. Co. v. Jacksonville, Id. 37; City of Erie v. Erie Canal, 59 Pa. 174; State v. East Orange, 12 Vroom, 127.

"What are reasonable regulations, and what are the sub-
88 jects of police power, must necessarily be judicial questions. The law making power is the sole judge when the necessity exists, and when if at all, it will exercise the right to enact such laws." Toledo Co. v. Jacksonville, supra.

"The necessity and propriety of the enactment in question were exclusively for the legislature, and not for the courts to pass upon," referring to the act requiring the sounding of whistles at highway crossings. P. C. C. & St. L. Ry. v. Brown (1879) 67 Ind. 45, citing 2 Redfield on Railways 461, where it is said, "of the importance or necessity of which, the legislature must be the judge."

It is urged that our opinion is not supported by the cases of Lake Roland Co. v. Mayer, 77 Md. — and Baltimore Trust Co. v. Baltimore 166 U. S. for the reason that both cases arose under the same ordinance, and "the state court found and held that the power of the city council to amend or modify or repeal its ordinance was expressly written in the statute of the state authorizing the passage of such ordinance." This insistence was made when the case was originally before us, and we are unable to discover any authority for it: We have gone over the matter again in an attempt to discover whether we were in error in our understanding of these cases. The legislative act was a curative and ratifying act, ratifying the ordinance after its passage, and concluding with the declaration, "the said mayor and city council to have the same power and control hereafter in reference to the enforcement, amendment, or repeal of said ordinance as it has, or would have in respect to any ordinance passed under its general powers." There was no general statute authorizing amendment or repeal, and there was no right of repeal reserved in the ordinance itself, and this clause was no more than the statement of the common law, so far as the police power was involved. It was not urged by counsel that there was any reserve right of repeal in the ordinance or under any statute, and the case is not predicated upon any reserve right of repeal. The court said, "The repealing ordinance was passed because as stated in the pre-

amble the city council thought that it was required by "the public safety and convenience," and proper regulation of the use of the streets. These considerations for the repeal were within their legislative judgment and discretion, and the evidence shows that the ordinance has "a real and substantive relation" to the objects proposed. It is therefore not subject to supervision, or review by
89 the courts."

"It has been well said in reference to such general grants of power, that as to the degree of necessity for municipal legislation, on subjects committed to their charge, the mayor and city council are the exclusive judges, while the selection of means and manner (contributory to the end) of exercising the powers which they may deem requisite to accomplishment of the objects of which they are made the guardians, is committed to their sound discretion." Mayor v. Radeicke, 49 Md. 217;

In Gloucester Ferry Co. v. Penna. 114 U. S. 193, it is said "The power to regulate commerce is the power to prescribe the rules by which it shall be governed, that is the conditions upon which it shall be conducted," and in Baltimore Co. v. Baltimore, supra, it is said, "If it be said (as is here urged) that the city had already regulated the use by prescribing that there should be two tracks, the answer is, that this power of regulation is a continuing power: it is not exhausted by being once exercised, and so long as the object is plainly one of regulation, the power may be exercised as often as, and whenever the common council may think proper: the use of the street may be subjected to one condition today, and another and additional one tomorrow, provided the power is exercised in good faith, and the condition imposed is appropriate, as a reasonable regulation, and is not imposed arbitrarily or capriciously."

There is here no charge of bad faith, or arbitrary, or capricious imposition, nor any allegation disclosing the reason for the action of the council, and we must assume that there was some reason for it. The presumption is in favor of the reasonableness of the council's action, unless the contrary appears on the face of the ordinance, or is disclosed by the complaint. Schmidt v. Indianapolis (1907) 168 Ind. 631; Indianapolis v. Bieler, 138 Ind. 30; State ex rel. v. White, 82 Ind. 278; Trenton etc. Co. v. Trenton, 50 N. J. L. 132; Mayer v. ——, 23 Md. 467; Van Hook v. City of Selma, 70 Ala. 361; Birmingham v. Alabama Co. 98 Ala. 234; 46 Am. & Eng. Corp. Cases, 631. People v. De Hart, 134 Mich. 682; 97 N. W. R. 36; 104 Am. St. R. 616*n*. St. Louis v. Western Union Co. 63 Fed. R. 68; Illinois Central Co. v. Chicago, 169 Ill. 329; Larkin v. Burlington Co. 85 Ia. 492; Stafford v. Chippewa Co. Id. 331;

We can not say that an ordinance is unreasonable which would restrict the number of railroad tracks on a street for a distance of three or four squares, to one track, when more than one
90 might tend to interfere with the free use of the street by the general public, or affect the security of life, or property in its use. People v. Ft. Wayne, etc. Co. 95 Mich. 522; Detroit etc. Co. v. Mills, 85 Mich. 643; Grand Rapids Co. v. West Side Co. 48 Mich.

433; Dubach v. Hannibal, etc. Co. 89 Mo. 483; Commonwealth v. City of Frankfort, 17 S. W. R. (Ky.) 287.

Reduced to its last analysis the proposition is this: Does a complaint which alleges that a street is 82½ feet in width, without any allegation as to the width of the roadway; which alleges that the obstruction of a public street will be much less with two tracks than with one, and that there is ample room for general travel, without any showing as to the conditions of travel on the street, or its requirements, or any improper motive in the council's action, but is predicated upon the necessities of the Railway from the increased volume of traffic upon an extensive main line of railway which is being double tracked, and which it is sought to double track through a portion of the street, make such a case as that the court can say as a matter of law, that to restrict the line to a single track for a distance of three or four squares, is an unreasonable regulation, under a statute which provides that, "the common council shall have exclusive power over the streets, highways, alleys, and bridges, within such city." 3 Davis Sup. Sec. 61, p. 94, and another statute providing that the common council shall have power "to provide by ordinance for the security of citizens and others from the running of trains through any city, and to require railroad corporations to observe the same." 3 Davis Supp. p. 88, subd. 42, or overcome the presumption of the action being reasonable, and based upon sufficient grounds, and within the discretion of the city authorities.

Suppose the city should see fit to prohibit the propelling of cars over the street by steam? It would result in quite as serious inconvenience we may well suppose to appellant, even if it had two tracks, as the restriction to one track, yet such power is undeniable, and we could not set up our judgment as to its being unreasonable. Washington Co. v. Alexandria, 96 U. S. 521; State v. Jersey City, 5 Dutch. 170; Great Western Co. v. Decatur, 33 Ill. 381; Philadelphia v. —— Co. 3 Grant's Cas. Pa. 403; State vs. Mayo, 75 At. R. 295; State v. Dudley, S. C. 135; Veazie v. Mayo, 45 Me. 560; 2 Redfield on Rys. 564; Elliott on Railroads, 3rd Ed. section 1096*n* and notes.

Renewed attention to, and reconsideration of the subject,
91 fails to lead us to any other conclusion than that previously announced.

The petition for a rehearing is overruled.

92 It is therefore considered by the Court that the judgment of the Court below in the above entitled cause, be in all things — at the cost of the — all of which is ordered to be certified to said Court.

And it is further considered by the Court, that the — recover of the — the sum of — for — costs and charges in this behalf expended.

THE STATE OF INDIANA,
Supreme Court:

I, Ed. V. Fitzpatrick, Clerk of the Supreme Court, of the State of Indiana, certify the above and foregoing to be a true and complete copy of the opinion and judgment of said Court in the above entitled cause.

In witness whereof, I hereto set my hand and affix the seal of said Court, at the City of Indianapolis, this — day of —— 190-.

[Seal Supreme Court, State of Indiana. MDCCCXVI.]

——— ———, *C. S. C.*

93 And afterwards, towit: On the 27th day of May, 1910, the same being the 5th Judicial Day of the May Term, 1910, of said Supreme Court of Indiana the following further pleas and proceedings were had herein.

Comes now the appellant by its attorneys and files in the Office of the Clerk of said Supreme Court its petition for the allowance of a writ of error, said petition and its allowance thereof by the Honorable Leander J. Monks, Chief Justice of said Supreme Court for said May Term, 1910, being thereto next below attached and being in the words and figures following:

94 In the Supreme Court of Indiana.

No. 20981.

GRAND TRUNK WESTERN RAILWAY COMPANY, Appellant,
vs.
CITY OF SOUTH BEND, EDWARD FOGARTY, PIETR KOCZROWSKI, James H. Loughman, Hugh T. Montgomery, Henry F. Elbel, John C. Schreyer, August Steuckle, George Whiteman, Leo M. Kucharski, Michael J. Somers, Henry Hartzer, Board of Public Works of City of South Bend, William A. McInerney, John W. Papczynski, Edwin F. Nicar, and James L. McWeeney, Appellees.

Appeal from the Porter Circuit Court.

Petition for Allowance of Writ of Error from the Supreme Court of the United States.

To the Honorable Leander J. Monks, Chief Justice of the Supreme Court of Indiana:

Your petitioner, Grand Trunk Western Railway Company, respectfully represents that it is the appellant in the above entitled cause, and that it brought this suit in the St. Joseph Circuit Court, State of Indiana, against the defendants, who are the City of South Bend and various members of the common council, board of public works, mayor and chief of police of said city, to enjoin the defendants from preventing petitioner from laying down a second and

additional track in certain portions of Division Street in the City of South Bend. In response to service of process upon them the defendants appeared. The cause was then taken on change of venue to Laporte County. Thereupon petitioner filed an amended complaint in two paragraphs and defendants demurred to each paragraph of said amended complaint for want of sufficient facts. The Circuit Court sustained the demurrer and rendered judgment in favor of said defendants and against petitioner for costs of
95 suit. From the judgment so rendered by the Circuit Court the Grand Trunk Western Railway Company appealed to the Supreme Court of the State of Indiana, where said cause upon appeal was numbered and entitled as above; and afterwards on to-wit: the 23rd day of November, 1909, the said Supreme Court rendered judgment whereby it affirmed the judgment of the said Circuit Court and rendered judgment in favor of said defendants and against your petitioner for costs of suit.

Afterwards, and in due time, your petitioner filed in said Supreme Court a petition for a rehearing of said cause and a brief in support thereof, which petition for rehearing was afterwards, to-wit: on the 11th day of May, 1910, by said court overruled and denied; whereupon said judgment of the Supreme Court of Indiana, which is the highest court of the State of Indiana in which a decision of said suit could be had, became and is final.

Petitioner says it is aggrieved by the said judgment of the Supreme Court of Indiana and the proceedings in said suit, and that in said judgment and proceedings had prior thereto in said cause errors were committed to the manifest prejudice of petitioner, because it says that there was in said suit drawn in question the validity of an authority exercised under the State of Indiana on the ground of its being repugnant to the constitution of the United States, and the decision in said suit was in favor of its validity and that titles, rights, privileges and immunities were in said suit claimed by petitioner under the constitution and statutes of, and commissions held and authority exercised under, the United States, and the decision in said suit was against the titles, rights, privileges and immunities especially set up and claimed therein by petitioner
96 under such constitution, statutes, commissions and authorities as will hereafter more fully appear.

Petitioner further shows that it is averred in the amended complaint that petitioner is a railroad corporation organized under the laws of the State of Indiana, and is the owner of and operating a line of railroad extending from the City of Port Huron in the State of Michigan to the City of Chicago in the State of Illinois; that it is the same railway formerly known as the Peninsula Railroad and passes through the City of South Bend, and has existed as such corporation since the 10th day of December, 1866; that on or about the 24th day of October, 1866, the City of South Bend, by its Mayor and fourteen individuals, executed articles of association to incorporate for the purpose of building, owning and operating a railroad to be known as the "Peninsula Railroad Company" from the north line of the State of Indiana through South Bend, and thence in the di-

rection of Chicago; that on the 2nd day of March, 1868, the common council of the City of South Bend passed and enacted a certain ordinance known as ordinance Number 62, whereby consent, permission and authority was given and duly vested in the Peninsula Railroad Company to lay a double track, upon certain terms and conditions, in Division Street in said city, from the Western terminus of the bridge over the St. Joseph River to General Taylor Street. It is then averred that the conditions imposed by the said ordinance were accepted and fully performed, and a single track laid according to said ordinance, and that the grant to lay a double track was for the accommodation of the business of the railway company when at some future time the volume of the business should require such double track; that large sums of money had been spent by the predecessor of petitioner and by petitioner in fulfilling and per-
97 forming the conditions of said ordinance.

It is further averred that on the 14th day of October, 1901, the City of South Bend, through its common council, passed a certain ordinance by which it repealed so much of ordinance Number 62 as gave the right to lay down said double track in Division Street, claiming thereunder that said ordinance revoked petitioner's right to lay down said second track.

It is then averred that said ordinance Number 62 constituted a binding contract between the City of South Bend and the predecessor of petitioner, irrepealable by the city, and that petitioner had succeeded to all the rights of said Peninsula Company under said contract, and that said ordinance of repeal was void as an attempted impairment of the obligation of said contract in violation of the constitution of the United States.

It is then averred that on the 6th of October, 1902, petitioner attempted to lay said double track in accordance with said ordinance Number 62, but was prevented from doing so by the said City of South Bend, acting through its officers and agents, asserting that the action of the city council repealing said ordinance Number 62 was valid and thereby petitioner's right to lay said second track was revoked and defendants, acting through and under said repealing ordinance, forcibly prevented petitioner from putting down said second track.

The prayer of the petition was for an order perpetually enjoining the defendants from preventing petitioner from laying down said second track, in accordance with said ordinance Number 62.

Defendants' separate and several demurrers for want of sufficient facts were sustained to each of the amended paragraphs of com-
plaint. Whereupon, petitioner believing that each paragraph
98 of said amended complaint fully and sufficiently stated facts entitling petitioner to the relief prayed for, refused to plead over, and because of such refusal defendants were not required to answer it, and no issue was made upon said amended complaint, and the rights therein averred were denied petitioner; that petitioner duly excepted to the said ruling and judgment of the Circuit Court and upon its appeal to the Supreme Court assigned said ruling and judgment of the Circuit Court as error, as shown by its assignment

of errors in said court. But the Supreme Court overruled and refused to sustain said assignment of error and affirmed such action of said Circuit Court.

Petitioner refers to the record of this cause, as filed herein, for further and more complete statements of the rulings and proceedings complained of. And petitioner further says that in the proceedings above mentioned in said cause it specially set up and claimed that the repeal of ordinance 62 was an impairment of the obligation of said contract ordinance Number 62, which was protected by the contract clause of the constitution of the United States from such impairment and in addition that the enforcement of the repealing ordinance was a taking of the property of petitioner without due process of law. Petitioner specially set up in said suit and claimed titles, rights, privileges and immunities under the constitution of the United States, and the decisions of the said Circuit Court and of the Supreme Court were against the titles, rights, privileges and immunities specially set up by petitioner under the constitution of the United States.

Petitioner refers to the assignment of errors filed herewith, and prays that the same may be considered for the purposes of this application as a part hereof, and further prays that a writ of
99 error may be allowed and issued to the said Supreme Court of Indiana, which now has the record in said cause for the removal of said cause to the Supreme Court of the United States, to the end that the error in the said cause may be corrected and full and speedy justice done to the parties aforesaid in this behalf, and that the transcript of the record, proceedings and papers in said cause duly authenticated may be sent to said Supreme Court of the United States.

WILLIAM L. TAYLOR,
KRETZINGER, ROONEY & KRETZINGER,
Attorneys for Petitioner, Grand Trunk Western Railway Company.

Let the writ of error issue upon the execution of a bond by the Grand Trunk Western Railway Company to the above named defendants in the sum of one thousand dollars ($1,000), said bond when approved to act as supersedeas.

LEANDER J. MONKS,
Chief Justice, Supreme Court of Indiana.

May 27th, 1910.

100 [Endorsed:] No. 20981. In the Supreme Court of Indiana. Grand Trunk Western Railway Company, Appellant, vs. City of South Bend et als., Appellees. Petition for Writ of Error. Filed May 27, 1910. Edward V. Fitzpatrick, clerk. Kretzinger, Rooney & Kretzinger & Wm. L. Taylor, attorneys for petitioner.

101 In the Supreme Court of Indiana.

20981.

GRAND TRUNK WESTERN RAILWAY COMPANY, Appellant,
vs.
CITY OF SOUTH BEND et als., Appellees.

Suggestions in Support of the Application for the Allowance of a Writ of Error from the Supreme Court of the United States.

The Supreme Court of Indiana upheld the validity of the ordinance which repealed contract ordinance Number 62, which gave plaintiff the right to lay a double track in Division Street. This ruling, giving effect to the repealing ordinance, was an impairment of the contract rights of plaintiff as evidenced by contract ordinance Number 62, and presents a case within the jurisdiction of the Supreme Court of the United States.

In Northern Pacific Ry. v. Duluth, 208 U. S. 590, it was held:

"It is no longer open to question that municipal legislation passed under supposed legislative authority from the State is within the prohibition of the Federal Constitution and void if it impairs the obligation of contracts. Mercantile Trust Company v. Columbus, 203, U. S. 311-320, and cases there cited. * * *

"We think the municipal legislation complained of in this case amounts to more than a mere denial of liability or of the binding force of the former contract. The legislation which deprives
102 one of the benefit of a contract or adds new duties or obligations thereto necessarily impairs the obligation of the contract, and when the state court gives effect to subsequent state or municipal legislation which has the effect to impair contract rights by depriving the parties of their benefit, and make requirements which the contract did not theretofore impose upon them, a case is presented for the jurisdiction of this court. New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 350, 351. And this jurisdiction has been frequently exercised in cases of municipal ordinances having this effect upon prior contract rights. Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65-81; City of Cleveland, v. Ry. Co. 194 U. S. 517. As was said in City of Dawson v. Columbia Avenue Savings Fund, Safe Deposit, Title & Trust Co., 197 U. S. 178, it is not always easy to determine on which side of the line a given case may fall. But recurring to the resolution in this case, we are of the opinion that it is legislative action which impairs the obligation of the contract, if the contract is of binding force, which is a question to be determined upon the merits."

So in Mercantile Trust Co. v. Columbus, 203 U. S. 320 it was held:

"It is part of the duty of the Federal courts, under the impairment of the obligation of contract clause in the Constitution, to decide whether there be a valid contract and what its construction is, and whether, as construed, there is any subsequent legislation, by mu-

nicipality or by the state legislature, which impairs its obligation. That the ordinance of the common council of a municipal corporation may constitute a law within the meaning of this constitutional clause is too well settled to admit of doubt. St. Paul Gas Light Co. *v.* St. Paul, 181 U. S. 142, 148; Davis &c. Co. v. Los Angeles, 189 U. S. 207, 216."

In Chicago, etc. Ry. Co. vs. Nebraska, 170 U. S. 68, held:

"We have often had occasion to say that this court, when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, possesses paramount authority to determine for itself the existence or the nonexistence of the contract set up, and whether its obligation has been impaired by the state enactment. Jefferson Branch Bank v. Skelly, 1 Black, 436; Railroad Co. v. Rock, 4 Wall. 177; New Orleans Waterworks v. Louisiana Sugar Co., 125 U. S. 18; Mobile & Ohio Railroad v. Tennessee, 153 U. S. 486, 492."

103 In Kies vs. Lowrey, 199 U. S. 237, the state court held that the obligation of the contract involved had not been impaired, holding that the property in question was not held under any contract.

It was therefore contended, on motion to dismiss the writ of error, that the decision of the state court did not involve a federal question. But the court in overruling this contention held:

"This, however, overlooks the power and duty of this court to determine for itself the existence or non-existence of a federal question."

From the above rulings of the Supreme Court of the United States we contend that the prayer of the petition be granted, and a writ of error allowed for a review of the case by the Supreme Court of the United States.

Respectfully submitted.

W. L. TAYLOR,
KRETZINGER, ROONEY & KRETZINGER,
Attorneys for Grand Trunk Western Railway Company.

104 [Endorsed:] 20981. In the Supreme Court of Indiana. Grand Trunk Western Railway Company, Appellant, vs. City of South Bend et al., Appellees. Suggestions in support of petition for allowance of writ of error. Filed May 27, 1910. Edward V. Fitzpatrick, clerk. Kretzinger, Rooney & Kretzinger & Wm. L. Taylor, attorneys for appellant.

105 And on the same day the following further pleas and proceedings were had herein.

Comes now the appellant by its attorneys and files a writ of error from the Supreme Court of the United States to the Supreme Court of Indiana in said cause, said writ of error being issued by Noble T. Butler, Clerk of the Circuit Court of the United States for the district of Indiana, and being hereto next below attached and being in the words and figures following:

106 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the Supreme Court of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said Appellate Court before you between the Grand Trunk Western Railway Company and the City of South Bend and others, a manifest error hath happened to the great damage of said Grand Trunk Western Railway Company, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington thirty days after the date thereof, in the said Supreme Court of the United States to be then and there held, that the record and proceedings aforesaid being inspected, said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States and the seal of this Circuit Court this 27th day of May, A. D. 1910.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER,
Clerk of the Circuit Court of the United States for the District of Indiana.

Allowed: this 27th day of May, A. D. 1910.

LEANDER J. MONKS,
Chief Justice of the Supreme Court of Indiana.

107 [Endorsed:] 20981. In the Supreme Court of Indiana. Grand Trunk Western Railway Company vs. City of South Bend. Writ of Error. Filed May 27, 1910. Edward V. Fitzpatrick, Clerk. Kretzinger, Rooney & Kretzinger, William L. Taylor, Att'ys for App't.

108 And on the same day the following further pleas and proceedings were had herein.

Comes now the appellant by its attorneys and files its bond on appeal to the said Supreme Court of the United States in the penal sum of One Thousand ($1,000) Dollars which bond is approved by the Chief Justice of said Supreme Court of Indiana for the May Term, 1910, a copy of said bond being next below attached and being in the words and figures following:

Know all men by these presents that we, Grand Trunk Western Railway Company, as principal, and National Surety Company, as surety, are held and firmly bound unto the City of South Bend, Edward Fogarty, Pietr Koczrowski, James H. Loughman, Hugh T. Montgomery, Henry F. Elbel, John C. Schreyer, August Steuckle, George Whiteman, Leo M. Kucharski, Michael J. Somers, Henry Hartzer; the Board of Public Works of the City of South Bend, William A. McInerney, John W. Papczynski, Edwin F. Nicar and James L. McWeeney, in the full and just sum of one thousand ($1,000) dollars, to be paid to the said City of South Bend, Edward Fogarty, Pietr Koszrowski, James H. Loughman, Hugh T. Montgomery, Henry F. Elbel, John C. Schreyer, August Steuckle, George Whiteman, Leo M. Kucharski, Michael J. Somers, Henry Hartzer; the Board of Public Works of the City of South Bend, William A. McInerney, John W. Papczynski, Edwin F. Nicar and James L. McWeeney, their assigns or successors in office, for which payment well and truly to be made we bind ourselves and each of us, and each of our assigns and successors, jointly, severally and firmly by these presents.

Sealed with our seals and dated this 20th day of May, A. D. 1910.

Whereas, lately, at a term of the Supreme Court in and for the State of Indiana, in a suit pending in said court between the Grand Trunk Western Railway Company, as appellant, and the City of South Bend, Edward Fogarty, Pietr Koszrowski, James H. Loughman, Hugh T. Montgomery, Henry F. Elbel, John C. Schreyer, August Steuckle, George Whiteman, Leo M. Kucharski, Michael J. Somers, Henry Hartzer, the Board of Public Works of the
110 City of South Bend, William A. McInerney, John W. Papczynski, Edwin F. Nicar and James L. McWeeney, as appellees, a judgment was rendered in and by said Supreme Court of the State of Indiana against the said Grand Trunk Western Railway Company, affirming a certain judgment of the Circuit Court of La Porte County, State of Indiana, sustaining the demurrers of appellees to the complaint of appellant, and dismissing the same and rendering judgment for costs against appellant, in said cause. And the said Grand Trunk Western Railway Company having obtained a writ of error and filed a copy hereof in the clerk's office of said Supreme Court to reverse judgment in the aforesaid cause, and a citation directed to the said City of South Bend, Edward Fogarty, Pietr Koczrowski, James H. Loughman, Hugh T. Montgomery, Henry F. Elbel, John C. Schreyer, August Steuckle, George Whiteman, Leo M. Kucharski, Michael J. Somers, Henry Hartzer, the Board of Public Works of the City of South Bend, William A. McInerney, John W. Papczynski, Edwin F. Nicar and James L. McWeeney, citing and admonishing them to be and appear at the Supreme Court of the United States to be holden at Washington within thirty days of the date hereof.

Now the condition of the above obligation is such that if the said Grand Trunk Western Railway Company shall prosecute its writ of error to effect and answer all damages and costs if it fails to make its

plea good, then the above obligation to be void, otherwise to remain in full force and effect.

[SEAL.] GRANK TRUNK WESTERN RAILWAY COMPANY,
By J. J. ROONEY, *Its Attorney-in-Fact.*
THE NATIONAL SURETY COMPANY,
E. A. ST. JOHN, *Resident Vice-President.*

HOMER H. McKEE,
Resident Assistant Secretary.

I approve the foregoing bond this 27th day of May, A. D. 1910.

LEANDER J. MONKS,
Chief Justice of Supreme Court of Indiana.

I, John C. Billheimer, Auditor of State of the State of Indiana, do hereby certify that the National Surety Company, surety on the within bond, has fully complied with the laws of the state of Indiana, concerning foreign surety companies, and is authorized to do business in this state.

Dated May 27, 1910.

[SEAL.] JOHN C. BILLHEIMER,
Auditor of State.

111 [Endorsed:] No. 20981. In the Supreme Court of Indiana. Grand Trunk Western Railway Company, App't, vs. City of South Bend et als., Appellees. Bond upon writ of error from the Supreme Court of the United States. Filed May 27, 1910. Edward V. Fitzpatrick, Clerk. Kretzinger, Rooney & Kretzinger, William L. Taylor, Att'ys for App't.

112 And on the same day the following further pleas and proceedings were had herein.

Comes now the appellant by its attorneys and files its citation on said writ of error with proof of service on attorneys for defendant in error, which said citation and proof of service thereof are hereto next below attached and are in the words and figures following:

113 UNITED STATES OF AMERICA, *ss:*

To the City of South Bend, Edward Fogarty, Pietr Koczrowski, James H. Loughman, Hugh T. Montgomery, Henry F. Elbel, John C. Schreyer, August Steuckle, George Whiteman, Leo M. Kucharski, Michael J. Somers, Henry Hartzer, the Board of Public Works of the City of South Bend, William A. McInerney, John W. Papczynski, Edwin F. Niear and James L. McWeeney, or your successors in office:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Indiana, wherein

Grand Trunk Western Railway Company is the plaintiff in error and you are the defendants in error, to show cause, if any there be, why the judgment rendered against plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of May, A. D. 1910.

[Seal Supreme Court, State of Indiana. MDCCCXVI.]

LEANDER J. MONKS,
Chief Justice of the Supreme Court of Indiana.

Attest:

EDWARD V. FITZPATRICK,
Clerk Supreme Court of Indiana.

STATE OF INDIANA,
County of Marion:

We hereby accept service of the above and foregoing citation in error and waive further service thereof this 31st day of May, A. D. 1910.

IDEN S. ROONEY,
HARRY R. WAIR,
Attorneys for Defendants in Error.

114 [Endorsed:] 20981. In the Supreme Court of Indiana. Grand Trunk Western Railway Company, Appellant, vs. City of South Bend et als., Appellees. Citation. Filed May 27, 1910. Edward V. Fitzpatrick, Clerk. Kretzinger, Rooney & Kretzinger, William L. Taylor, Att'ys for Appellant.

115 And on the same day the following further pleas and proceedings were had herein.

Comes now the appellant by its attorneys and files an assignment of errors in the Supreme Court of the United States on the writ of error herein, said assignment of errors being hereto next below attached and being in the words and figures following:

116 In the Supreme Court of the United States.

No. —.

GRAND TRUNK WESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
CITY OF SOUTH BEND, EDWARD FOGARTY, PIETR KOCZROWSKI, James H. Loughman, Hugh T. Montgomery, Henry F. Elbel, John C. Schreyer, August Steuckle, George Whiteman, Leo M. Kucharski, Michael J. Sommers, Henry Hartzer, Board of Public Works of the City of South Bend, William A. McInerney, John W. Papczynski, Edwin F. Nicar, and James L. McWeeney, Defendants in Error.

Appeal from the Porter Circuit Court to the Supreme Court of Indiana.

Assignment of Errors.

Now comes Grand Trunk Western Railway Company, plaintiff in error in the above entitled cause, and on writ of error from the Supreme Court of the United States says that in the record and proceedings in said cause there is manifest error in this, to-wit:

1. The judgment of the Supreme Court of Indiana upholding the validity of the repealing ordinance of the City of South Bend, whereby contract ordinance number 62 was revoked, was an
117 impairment of the obligation of said contract in violation of Section 10 Article 1 of the Constitution of the United States.

2. The judgment of the Supreme Court of Indiana, holding that the City of South Bend had the right to revoke contract ordinance 62, which gave plaintiff in error the right to lay a second track in Division Street, after acceptance of its terms and conditions and after expenditures of money in compliance therewith, was a taking of petitioner's property without due process of law in violation of Section One of Article Fourteen of the amendments to the Constitution of the United States.

Wherefore, said plaintiff in error prays that the judgment of said courts of the State of Indiana be reversed and said cause remanded for such other proceedings as the Constitution and laws of the United States may require.

KRETZINGER, ROONEY & KRETZINGER,
WILLIAM L. TAYLOR,
Attorneys for Appellant, Being the Plaintiff in Error.

118 [Endorsed:] No. —. In the Supreme Court of the United States. Grand Trunk Western Railway Company, Plaintiff in Error, vs. City of South Bend and Others, Defendants in Error. Assignment of Errors. Filed May 27, 1910. Edward V. Fitzpatrick, Clerk. Kretzinger, Rooney & Kretzinger, William L. Taylor, Attorneys for Appellant.

119 STATE OF INDIANA:

In the Supreme Court.

I, Edward V. Fitzpatrick, Clerk of the Supreme Court of the State of Indiana, certify the above and foregoing to be a full, true and complete transcript of the record and proceedings had, papers filed, motions decided, rulings made, opinions delivered, judgments rendered and all decrees and orders entered in the Supreme Court of Indiana in the above entitled cause, The Grand Trunk Western Railway Company vs. The City of South Bend, et al., and numbered 20,891 in said court, also the original petition for the allowance of a writ of error, the original writ of error in the Supreme Court of the United States to the Supreme Court of the State of Indiana with the allowance thereof; the original citation to the defendant in error and proof of service thereof; a copy of the original bond and of its approval by the Chief Justice of said Supreme Court of Indiana for the May Term, 1910, and the original assignment of errors by the plaintiff in error in the Supreme Court of the United States, as appears from the papers and record of said cause on file in my office.

Which said transcript annexed hereto together with said original petition for the allowance of a writ of error, the original writ of error, the original citation, a copy of the original bond and the original assignment of errors, I hereby certify as and for my full return to said writ of error.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court of Indiana, at the City of Indianapolis, this 13th day of June, 1910.

[Seal Supreme Court, State of Indiana. MDCCCXVI.]

EDWARD V. FITZPATRICK,
Clerk Supreme Court of Indiana.

Endorsed on cover: File No. 22,230. Indiana Supreme Court. Term No. 81. Grand Trunk Western Railway Company, plaintiff in error, vs. The City of South Bend et al. Filed June 21st, 1910. File No. 22,230.

Office Supreme Court, U. S.
FILED.
DEC 11 1912
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 81.

GRAND TRUNK WESTERN RAILWAY CO.,
PLAINTIFF IN ERROR,

vs.

CITY OF SOUTH BEND ET AL.,
DEFENDANTS IN ERROR.

ADDITIONAL AUTHORITIES RELIED ON BY PLAINTIFF IN ERROR.

Murray *vs.* Charleston, 96 U. S., 432, at pages 441-442.

Covington, etc., Turnpike Co. *vs.* Sandford, 164 U. S., 578, at pages 595, 596, and cases therein cited.

Dobbins *vs.* Los Angeles, 195 U. S., 223, pages 236-238.

State of Indiana *ex rel.* City of Indianapolis *vs.* Indianapolis Union Railway Company (Indiana

Supreme Court, Feb. 4, 1903), 60 L. R. A., 831, at pages 833-834, 836-837.

Dillon on Municipal Corporations, 5th ed., vol. III, secs. 1242, 1269.

Telephone Co. *vs.* Jersey City, 49 N. J. L., 303, at page 305.

Mayor, etc., of Birmingham *vs.* Ala., etc., R. R., 98 Ala., 134.

Workman *et al.* (City of Los Angeles, Intervener) *vs.* Southern Pac. R. Co. (Supreme Court of California, Aug. 20, 1900), 62 Pac. Rep., 185, at pages 186, 187.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1912.

GRAND TRUNK WESTERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
CITY OF SOUTH BEND et al.,
Defendants in Error.

} Error to the Supreme Court of the State of Indiana.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

This action was brought in the St. Joseph Circuit Court of the State of Indiana, by the Grand Trunk Western Railway Company, plaintiff in error, against defendants in error, the City of South Bend and certain of its officers, to enjoin them from interfering with plaintiff in error in its attempt to lay down a second track over certain portions of Division street in the City of South Bend, State of Indiana, so as to make it a double track road. The cause was then taken on change of venue to LaPorte County. Thereupon plaintiff in error filed an amended complaint in two paragraphs

(Rec., 4) and defendants in error demurred to each paragraph of said amended complaint for want of sufficient facts. (Rec., 34 to 41.) The Circuit Court sustained the demurrer (Rec., 42) and rendered judgment in favor of said defendants in error and against plaintiff in error for costs of suit. (Rec., 43.) From the judgment so rendered by the Circuit Court plaintiff in error appealed to the Supreme Court of the State of Indiana (Rec., 43), where said cause was heard upon appeal upon briefs and arguments filed by the respective parties; and afterwards on, to-wit: the 23rd day of November, 1909, the Supreme Court rendered judgment whereby it affirmed the judgment of the said Circuit Court and rendered judgment in favor of said defendants in error and against plaintiff in error for costs of suit. (Rec., 45.)

Afterwards, and in due time, plaintiff in error filed in said Supreme Court a petition for a rehearing of said cause and a brief in support thereof (Rec., 55), which petition for rehearing was afterwards, to-wit: on the 11th day of May, 1910, by said court overruled and denied (Rec., 60), whereupon said judgment of the Supreme Court of Indiana, which is the highest court of the State of Indiana in which a decision of said suit could be had, became and is final.

Plaintiff in error considering itself aggrieved by the said judgment of the Supreme Court of Indiana and the proceedings in said suit, and that in said judgment and proceedings had prior thereto in said cause errors were committed to its prejudice, filed its petition for the allowance of a writ of error from this court to the Supreme Court of the State of

Indiana, said petition being addressed to and allowed by the Chief Justice of the Supreme Court of Indiana upon the ground among other things, that there was in said suit drawn in question the validity of an authority exercised under the State of Indiana on the ground of its being repugnant to the Constitution of the United States, and the decision in said suit was in favor of its validity and that titles, rights, privileges and immunities were in said suit claimed by petitioner under the Constitution and statutes of, and commissions held and authority exercised under the United States, and the decision in said suit was against the titles, rights, privileges and immunities specially set up and claimed therein by petitioner under such Constitution, statutes, commissions and authorities as more fully appears from the petition for the writ of error which appears of record herein. (Rec., 61.)

Plaintiff in error further shows that it is averred in the amended complaint (Rec., 4) that plaintiff in error is a railroad corporation organized under the laws of the State of Indiana, and is the owner of and operating a line of railroad extending from the City of Port Huron in the State of Michigan to the City of Chicago in the State of Illinois; that it is the same railway formerly known as the Peninsular Railroad and passes through the City of South Bend, and has existed as such corporation since the 10th day of December, 1866; that on or about the 24th day of October, 1866, the City of South Bend, by its Mayor and fourteen individuals executed articles of association to incorporate for the purpose of building,

owning and operating a railroad to be known as the "Peninsular Railroad Company" (the predecessor of plaintiff in error) from the north line of the State of Indiana through South Bend, and thence in the direction of Chicago; that on the 2nd day of March, 1868, the Common Council of the City of South Bend passed and enacted a certain ordinance known as Ordinance No. 62 (Rec., 5), whereby consent, permission and authority was given and duly vested in the Peninsular Railroad Company to lay a double track, upon certain terms and conditions, viz: First, that the grant should not be construed to interfere with the private rights of the owners of real estate over which the road might be located. Second, that when the road crossed any street or alley it should be made to conform to the grade of such street unless the Common Council should consent to a variation. Third, that at a crossing of streets and alleys the company should lay its track in such a manner as to cause as little obstruction as possible to the passage of vehicles and should plank its track at all street and alley crossings the entire width of said street or alley, and should plank or gravel the "sidewalk" where "they" might cross said railroad and keep the crossings safe and convenient and in good repair; that the company should construct and keep in repair culverts and drains to admit the passage of water; that if it should fail to put in the crossings and keep the same in repair or to construct and keep in repair the culverts that then the same should be done by the street commissioner of the city, and the latter should collect the cost thereof by suit; that the com-

pany should not permit cars or locomotives to stand on street and alley crossings so as to obstruct the free passage of vehicles or individuals and should ring its bells and should not run its locomotives or cars faster than five miles an hour between Chapin and Michigan streets; that no more than one track should be laid across any street without the previous consent of the Common Council except only the privilege which it was stated in said ordinance-contract "is hereby granted to lay down a double track across the bridge over the St. Joseph river, and from the western terminus of said bridge to General Taylor street in said city"; that the predecessor of plaintiff in error in the year 1871, relying on the full force of Ordinance 62, built its railroad through St. Joseph County in the State of Indiana, and did build a single track through Division street, and in so doing laid a single track of rails on the street from the west end of a bridge crossing the St. Joseph river, extending to the west side of Laurel street, in said city; that the track was laid in the center of said street and southwesterly from Laurel street to the west side of the county, and that the said Peninsular Railroad Company and its successors, relying on the full force of Ordinance 62, have ever since kept up and maintained and operated the same as a railroad, and that this plaintiff is now operating the same as a railroad and a part of its continuous line; that in the year 1881, the Chicago & Grand Trunk Railroad Company (one of the predecessors of plaintiff in error), which was then operating and maintaining the road, desired to clear and perfect its title to the land used by it, and which

it would be necessary to use in operating its road as a right of way through Division street, and to settle with and compensate the owners of such land for their interest in the central part of the street so taken and occupied or to be thereafter used and occupied by said railroad company, and relying on the validity of said franchise and right to occupy said street so granted, did in accordance with the statutes of the State of Indiana appropriate for its use as and for a railroad track a strip of land eighteen feet wide from north to south extending from east to west along the center of Division street, from a point ten rods, seven and one-half feet east of the east line of Michigan street to General Taylor street, and from the same point of origin to the bridge crossing the St. Joseph river, and paid for the same more than $7,000.

And the plaintiff in error in said amended complaint avers that it is now the owner in fee of the said right of way eighteen feet wide extending from the west end of the bridge crossing the St. Joseph river to Taylor street, in the City of South Bend, a distance of about two hundred rods; and that since the year 1871 "this company and its predecessors aforesaid have openly, continuously and notoriously occupied the center of Division street with its railroad from the west end of said bridge to Taylor street and have always claimed the right to lay down said double track across the St. Joseph river and along Division street from the west end of said bridge to the center of General Taylor street, whenever the requirements of their business should make it necessary and have expended large sums of

money in the maintenance of said track and have complied with the conditions required of them by said ordinance with the full knowledge and acquiesence of the City of South Bend and the authorities thereof." (Rec., 11-12.)

It is then stated that the grant in said ordinance of a right to a second track in Division street up to Taylor street was for an accommodation of the business of the railroad company when at some future time its business should come to be of such magnitude that a single track would not accommodate it, and that such second track should not be laid until that condition occurred and it is averred that such condition now exists and for more than a year past plaintiff in error has been actively engaged in double tracking its entire line of railroad from Port Huron, in the State of Michigan, to the City of Chicago, and has been forced so to do by increase of its business, and has already completed the laying of a second track for upwards of one hundred and fifty-seven miles of said road, and that it was the purpose of the plaintiff at an early date to convert its existing single track bridge across St. Joseph river into a double track bridge.

It is averred that it is essential to the successful operation of plaintiff's freight and passenger traffic over its railroad that it should have and maintain a second track on Division street as authorized by said ordinance and that to facilitate and accommodate the present volume of such traffic the second track is especially necessary in view of the fact that plaintiff's freight and passenger station is located adjacent to Division street between the St. Joseph

river and General Taylor street, and that at said station both freight and passenger trains have to stop for train orders.

It is further averred that the obstructing of the general public in its use of said street by passing trains will be much less when two tracks are used than it is now when all trains both ways have to pass over a single track and that said street is eighty-two and one-half feet wide and that there is ample room thereon for general travel and for said double track.

That at various and frequent times between the first building of said existing track through Division street and until the present time the City of South Bend has ratified and confirmed said ordinance so granted to the Peninsular Railway Company by requiring the plaintiff and its several predecessors to spend money in changing the grade of the track and in planking and grading the same in accordance with said ordinance and even in a manner more expensive than so specified; also in lighting and watching crossings of plaintiff's track with various streets in said city; that all of said requirements were complied with and said Chicago & Grand Trunk Railway Company expended large sums of money, to-wit: five thousand dollars, and the plaintiff spent and must continue to spend large sums of money in so doing, to-wit: the sum of three thousand dollars annually and in so doing relied on said position assumed by said city that said ordinance was in its entirety a valid and existing grant and that the same was so taken and treated by said city

and that said city would not attempt to rescind said ordinance or any portion thereof. (Rec., 12-13.)

It is averred that on the first day of January, 1881, said Chicago & Grand Trunk Railway Company did lay down a double track on Division street, between the St. Joseph river and Michigan street, and it and its said assigns have ever since used and appellant still uses the same. (Rec., 13.)

It is further stated that on the 14th day of October, 1901, the City of South Bend, through its Common Council, attempted by ordinance to repeal so much of said ordinance Number Sixty-two as gives the right to a second track in said street, and that the city now sets up a claim that said action of the Common Council was effective in that behalf and that thereby the right of plaintiff in error to said second track was lawfully revoked. And plaintiff claimed that the said ordinance constituted a contract in its entirety between said city and said railway company, in whose behalf it was granted, irrepealable by said city either in whole or in part, and that the plaintiff had succeeded to all the rights of said railroad company under said contract, and that the ordinance of repeal was void as violative of said contract, and the plaintiff's right thereunder, and in conflict with Section 10 of Article I of the Constitution of the United States and also with Section 24 of Article I of the Constitution of the State of Indiana. (Rec., 13.)

It is then averred that on the 6th day of October, 1902, the plaintiff deemed it necessary to lay down such additional and double track west on Division street to Taylor street, and it brought to South

Bend a work train laden with rails and ties necessary therefor, and commenced doing the work, and that then the defendants in error interfered with it and forcibly prohibited and prevented the plaintiff in error from laying down said double track. (Rec., 13-14.)

WHEREFORE plaintiff prayed that the defendants and each of them should be enjoined from in any way hindering or preventing the plaintiff from laying down said second and additional track as aforesaid, and that it should be found and decreed by the court that the plaintiff had a valid and undisputed right to lay down its railroad on Division street and that the court adjudge its right so to do to be valid and effective and the defendants and their servants and agents should be enjoined from interfering with or hindering the plaintiff in the exercise and enjoyment of such rights and privileges. (Rec., 14.)

The second paragraph of the amended complaint (Rec., 14) is in all respects substantially the same as the first, except as to some of the allegations referring to the abandonment of the original Peninsula Railroad and the succession of the new Peninsula Railroad to its rights, franchises and property, and the only difference in those respects is that in the first paragraph of the amended complaint it is stated that the appraisement was had of the property of the original road and the appraised value was paid into the treasury of said St. Joseph County, where in the second paragraph it is stated that the plaintiff is unable to find any record, paper, entry or document

of any sort showing or tending to show that such an appraisement was made or that any of said money was paid, but it is averred that the second named Peninsular road did, with the consent of said first named company, and without any objection on the part of any stockholder or creditor, and with the assent of the City of South Bend, take possession of all the rights, privileges, rights-of-way, franchises and property of the said Peninsular Railroad Company, and that the first named company did surrender and deliver over to the second company the possession of all of its property, privileges, rights-of-way and immunities, and that the City of South Bend assented thereto and the new company did thereupon take possession of all the property of the original company. It is further stated that after this Peninsular Company united with the Michigan Company under the same name, it was supposed that all the property of the original road had been appraised, and that the amount thereof had been paid, and it was considered and supposed by all parties, including the City of South Bend, that the said second Peninsular Railroad Company was entitled to all of the property of the first company, together with all its rights and franchises. It was also stated that the Chicago & Grand Trunk Railroad Company, supposing its title was in all respects perfect, and that it was entitled, among other things, to lay down and construct a double track through that portion of Division street in the City of South Bend lying between Taylor street and the bridge, had kept up and maintained its single line of track through Division street and

taken possession of and held all of said railroad and expended in finishing and completing it over a million dollars (Rec., 20), and relying on said ordinance and under such supposition and in good faith did proceed to lay down and complete a double track on its railroad along a large portion of its line, and at the commencement of this action had expended in the construction of said double track over a million dollars. (Rec., 22.) All the above facts, actions and conditions in the petition set forth are admitted by the separate and several demurrers of defendants in error.

Defendants in error's separate and several demurrers for want of sufficient facts were sustained to each of the amended paragraphs of complaint. (Rec., 42.) Whereupon, petitioner, believing that each paragraph of said amended complaint fully and sufficiently stated facts entitling petitioner to the relief prayed for, refused to plead over (Rec., 42), and because of such refusal defendants in error were not required to answer. Answer was filed and afterwards withdrawn. This answer was inadvertently copied into the record but may be entirely disregarded. No issue was made upon the amended complaint, and the rights therein averred were denied plaintiff in error. Plaintiff in error duly excepted to the said ruling and judgment of the Circuit Court (Rec., 42), and upon its appeal to the Supreme Court assigned said ruling and judgment of the Circuit Court as error, as shown by its assignment of errors in said court. (Rec., 1-3.) But the Supreme Court overruled and refused to sustain said assign-

ment of error and affirmed such action of said Circuit Court. (Rec., 55.)

Plaintiff in error in the proceedings above mentioned in said cause specially set up and claimed that the repeal of Ordinance 62 was an impairment of the obligation of said contract ordinance, number 62, passed and enacted March 2, 1868, which was protected by the contract clause of the Constitution of the United States from such impairment and in addition that the enforcement of the repealing ordinance was a taking of the property of petitioner without due process of law. (Rec., 13.) The state courts, however, gave effect to the subsequent or repealing ordinance and thereby the decision of the state courts was against the right specially set up by plaintiff in error under the Constitution of the United States.

SPECIFICATION OF ERRORS RELIED UPON.

Plaintiff in error claims that there is manifest error on the face of the record in the following particulars, to-wit:

1. The judgment of the Supreme Court of Indiana upholding the validity of the repealing ordinance of the City of South Bend, whereby contract ordinance number 62, passed and enacted March 2, 1868, was revoked, was an impairment of the obligation of said contract in violation of Section 10, Article 1, of the Constitution of the United States.

2. The judgment of the Supreme Court of Indiana holding that the City of South Bend had the right to revoke said contract ordinance 62, which gave plaintiff in error the right to lay a second track in Division street, after acceptance of its terms and conditions and after expenditures of money in compliance therewith, was a taking of petitioner's property without due process of law in violation of Section 1 of Article Fourteen of the Amendments to the Constitution of the United States.

BRIEF OF ARGUMENT.

First.

The Supreme Court of the United States determines for itself whether there is an existing contract, and where there is diversity of state decisions, the first in time may constitute the obligation of the contract and the measure of rights under it.

The Chief Justice of the Indiana Supreme Court granted the writ of error in this case to review the decision of the Indiana Supreme Court as provided by law, upon claim and contention of plaintiff in error that its contract with defendants in error as contained and recited in Ordinance 62 of the City Council of South Bend had been impaired by the subsequent repealing ordinance of that city, and the decision of that court gave effect to the subsequent or repealing ordinance whereby the obligation of the contract created by the prior ordinance had been impaired; and also that the enforcement of the repealing ordinance was a taking of the property of plaintiff in error without due process of law. (Rec., 64.)

In *McGahey* v. *Virginia*, 135 U. S., 662, held:

> "In ordinary cases the decision of the highest court of a state with regard to the validity of one of its statutes would be binding upon this court; but where the question raised is whether a contract has or has not been made, the obligation which is alleged to have been impaired by legislative action, it is the prerogative of this court, under the Constitution of the United States, and the acts of Congress relating to

writs of error to the judgments of state courts, to inquire, and judge for itself, with regard to the making of such contract, whatever may be the views or decisions of the state courts in relation thereto."

In *Shelby County* v. *Bank,* 161 U. S., 149, Mr. Justice Peckham, speaking for this court, said:

"The Supreme Court will in a proper case decide for itself independent of the decisions of the state courts whether there is a contract and whether its obligations have been impaired."

In *Mobile & Ohio R. R. Co.* v. *Tennessee,* 153 U. S., 486, held:

"The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a state, by its terms or necessary operation, gives effect to some provisions of the state law, which is claimed by the unsuccessful party to impair the contract set out and relied on, this court had jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation."

In *Northern Pacific Ry.* v. *Duluth,* 208 U. S., 583, held (p. 590):

"In cases arising under this clause of the Federal Constitution this court determines for itself whether there is a contract valid and binding between the parties, and whether its obligation has been impaired by the legislative action of the state. *Stearns* v. *Minnesota,* 179 U. S., 223, 233. If the plaintiff in error set up a claim of contract upon substantial grounds and with allegations showing an impairment of its obli-

> gation by state or municipal legislation, a case was presented which might be brought to this court in event such legislation was upheld. *Chicago, Burlington & Quincy R. R. Co.* v. *Nebraska*, 170 U. S., 57."

In the case of *Pleasant Tp.* v. *Aetna Life Ins. Co.*, 138 U. S., 67, a decision of the state court, made before action begun, was relied upon as determining the proper interpretation of the state statute involved. In that case the question involved the constitutionality of an Ohio statute, authorizing Pleasant township to borrow money and issue bonds for the purpose of building a railroad. Under this statute the bonds in question were issued. *Subsequently,* the Supreme Court of Ohio, *but after the bonds had been issued,* held the statute void under the Ohio constitution. *Wyscaver* v. *Atkinson,* 37 Ohio St., 80. In a suit against the township upon certain of these bonds, this decision of the Ohio court was relied upon as a conclusive determination of the invalidity of the act under which the bonds had been issued. The opinion of the Supreme Court was by Mr. Justice Brewer, who said (p. 72):

> "We are not concluded by that determination. In matters of contract, especially, the right of citizens of different states to litigate in the federal courts of the various states is a right to demand the independent judgments of those courts. The settled law in that respect is well stated in the case of *Burgess* v. *Seligman,* 107 U. S., 20-33."

This doctrine is particularly applicable to the present case, where the earlier decisions of the Supreme Court of Indiana, cited below, held that

under the statutes of Indiana, in force at the time of the ordinance contract here relied on, a city had the power to enact such an ordinance and make such a contract, giving a consent to the use of its streets for railroad right of way, which consent became thereupon irrevocable, particularly in view of the fact that no power to repeal, alter or amend such consent was given by statute, that the franchise was granted by the state and not the city, and that expenditures made on the faith of such consent barred even the state, and *a fortiori* the city, from acts in derogation thereof.

Moreover, while there may be a diversity of Indiana decisions upon the right and power of a municipality to bind itself by contract for use of its streets, the rule of this court is that the first decisions in point of time determine the rights of the parties under the contract and fix the obligation thereof.

In *Muhlker* v. *Railroad Co.*, 197 U. S., 544, held:

> "This court determines for itself whether there is an existing contract and where there is diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it."

Second.

The Supreme Court of Indiana holds with uniformity that under the Indiana statutes cities have general jurisdiction over streets, and that under this general power the right to occupy streets by railroad tracks may be granted.

In *Tate* v. *The Ohio & Mississippi Railroad Company*, 7 Ind., 479, the Supreme Court of this state as early as 1856, held (p. 482):

> "Nor is it intended to intimate that it is not in the power of the city to authorize the railroad company to lay a track at the grade of William Street, and thus use it for the passage of their cars, in common with other public and private conveyances. To that extent the municipal authority may be conceded. *Hamilton* v. *The Harlem Railroad Co.*, 9 Paige, 171."

In *The Indianapolis & Cincinnati Railroad Company* v. *The State ex rel. the City of Lawrenceburg*, 37 Ind., 489, the Supreme Court of this state, in the consideration of this question, again declared:

> "They" (Common Council of the city) "may, it is true, grant an easement in the street to a railroad company, to use the street in common with the public."

In *Haslett* v. *The New Albany Belt & Terminal Railroad Company*, 7 Ind. App., 603, the court, approving and adopting the rule so often announced by the Supreme Court of that state, and as shown in a few of the cases so holding, held (p. 608):

> "A municipal corporation has the power and a right to grant permission to a railroad company to build its tracks *over* and *upon* its streets, but such grant does not transfer any proprietary rights of the persons owning lands abutting on such streets. *Such permission is simply a grant of the right to share with the general public the use of the easement. To that extent the power of the city is unlimited.* Such a grant does not impair or destroy the right of an abutting landowner, owning the fee in the street, to recover damages for the additional burden imposed upon his land."

Not only did the Supreme Court of that state so hold as to the statute in force at the date of the pas-

sage of this ordinance, and the making of this ordinance contract, but running all the way through the decisions of the Supreme Court the same rule has been employed in the interpretation and construction of the laws of that state pertaining to the control of the streets by the city, however the same may have been changed or modified from time to time.

Kistner, Executrix, v. *City of Indianapolis et al.,* 100 Ind., 210, involved an action brought by plaintiff to recover for a death caused by an accident occurring in the street. In that case there were a large number of tracks over the street crossing. In the discussion of the point here in argument the Supreme Court said (p. 218):

> "There can be no doubt in regard to the power of the City of Indianapolis over the streets of such city, and over Illinois street and its sidewalk at the place where the appellant's testator lost his life. The power of the city over the streets, highways and alleys within its corporate limits is an 'exclusive power.' Section 3161, R. S. 1881. Nor can it be doubted that the city had the power to grant its co-appellee, the Union Railway Company, the right and privilege to lay down and use the seven railroad tracks, leading from the Union Depot over and across Illinois street and the sidewalk thereof, within the city."

If the seven tracks or more laid over that street crossing did not interfere with public use, how can the double tracks here proposed constitute such an interference as would in any wise call for the exercise of the police power of the state or of the city?

In *Town of New Castle* v. *The Lake Erie & West-*

ern Railroad Company et al., 155 Ind., 18, the court sums up the whole question thus:

> "If the question were an open one in this state, it would be well to inquire if Dillon has not enunciated the correct rule. But by a long line of decisions it seems to have been thoroughly settled that municipalities in this state, under their general powers, have authority to grant railroad companies the right to lay their tracks longitudinally upon a street, provided that the use does not destroy nor unreasonably impair the street as a highway for the general public. * * * In granting such a privilege a city exercises a power delegated to it by the sovereign, and it is not liable for exercising such a power. The same doctrine is expressly or impliedly recognized in the following cases: *Protzman* v. *Indianapolis, etc., R. Co.*, 9 Ind., 467; 68 Am. Dec., 650; *Indiana, etc., R. Co.* v. *Boden*, 10 Ind., 96; *New Albany, etc., R. Co.* v. *O'Daily*, 12 Ind., 551; *Cox* v. *Louisville, etc., R. Co.*, 48 Ind., 178; *Indianapolis, etc., R. Co.* v. *Smith*, 52 Ind., 428; *Terre Haute, etc., R. Co.* v. *Scott*, 74 Ind., 29; *State* v. *Louisville, etc., R. Co.*, 86 Ind., 114; *Kistner* v. *City of Indianapolis*, 100 Ind., 210; *White* v. *Chicago, etc., R. Co.*, 122 Ind., 317; 7 L. R. A., 257; *Chicago, etc., R. Co.* v. *Eisert*, 127 Ind., 156; *Haus* v. *Jeffersonville, etc., R. Co.*, 138 Ind., 307."

The court concludes:

> "*These decisions* cover a period of more than *forty years*, and the doctrine has become a rule of property. *Nearly* every town and city in the state has a railroad running longitudinally along some street. *It is too late now to inquire into the justness and validity of the rule.*"

To the same effect see:

Dantzer et al. v. *The Indianapolis Union Railway Company*, 141 Ind., 604.

Pittsburg, Cincinnati, Chicago & St. Louis Railway Company v. *Noftsger*, 148 Ind., 101.

Decker v. *The Evansville, Suburban & Newburgh Railway Company*, 133 Ind., 493.

Dwenger v. *Chicago and Grand Trunk Railway Company*, 98 Ind., 153, was a suit brought by an abutting owner and involved the right of the present defendant in error to grant the ordinance now in question to this plaintiff in error. The plaintiff in that case lived on the line of Division street in South Bend, being the Division street mentioned in the bill of complaint. The fact that the street had been widened in 1869 by the city by adding thereto 16½ feet on the north, and that the railroad was placed in the center of the street thus widened, the question was, as to whether in the original settlement of damages to be paid by the railroad company the damages claimed by this abutting owner had been included, or whether he had suffered other damages, which he was entitled to recover, and in the course of that discussion it became necessary for the court to determine the authority of the City of South Bend to grant the ordinance here in question. Of course if South Bend was without the power to make this ordinance contract, then the railroad company was a trespasser upon the street, and the Supreme Court would have so held,

and would have so adjudged. The court said (p. 157):

> "The power of municipal corporations over streets embraces many other uses than those of ordinary travel on public highways. *Cummins* v. *City of Seymour, supra*" (79 Ind., 491; *McCowan* v. *Whitesides*, 31 Ind., 235; *Ross* v. *Thompson*, 78 Ind., 90). "And this court has said: 'So far as the highway, street, or easement is concerned, as the municipality has complete control thereof, it may, we presume, make or authorize any use of the street which will not essentially change and divert it from its intended uses as a public highway.' *Cox* v. *Louisville, etc., R. R. Co.*, 48 Ind., 179."

After citing and quoting from other decisions of the courts of last resort both in Indiana and other states, the Supreme Court continued (p. 158):

> "And many other decisions might be cited to the effect that the laying out and operating of a railway upon a street is not necessarily an unreasonable obstruction of its free use, *but rather a new and improved method of using the same germane to its principal object, and that for such consequences thereof as appear in this case there is no remedy, public or private.*"

Observe that this is stated by the Supreme Court with reference to this identical ordinance, and as to the power of South Bend under the then statute of Indiana to make the grant contained in the contract ordinance here involved in this suit.

Third.

The decisions of the Supreme Court of Indiana first in point of time hold that an ordinance making a grant similar to this is a contract which the municipality cannot subsequently impair.

In *Williams* v. *Citizens Ry. Co.*, 130 Ind., 71, held:

> "Where a right to use a street is acquired pursuant to statute and under a license from the municipality, it is in the nature of a contract right and the municipality itself *cannot destroy nor* materially impair it."

In *The City of Indianapolis* v. *The Indianapolis Gas Light & Coke Company*, 66 Ind., 396, the original ordinance granted to the gas company certain rights, including gas rates to consumers, etc., etc. That ordinance was passed March 19, 1866. Speaking of this ordinance contract, and of the later ordinances attempting to modify and change it, the Supreme Court said (p. 399):

> "That said city, on the 29th day of July, 1878, notified said gas company that she did not regard herself bound by said *contract* (not by a mere legislative ordinance) of July 22, 1876, and elected to and did treat said contract as a nullity, and that the city would not pay said company for gas furnished, and for lighting, extinguishing, cleaning and repairing of lamps, under the terms of said contract, on and after the 1st day of August, 1878."

The court first held that the city had the power to contract with the gas company in the form pro-

vided in the ordinance contract. The court then said (p. 402):

> "Municipal corporations, besides the power to contract, which is generally granted to them within certain limits, have legislative or governmental powers, by which they make by-laws to govern themselves, and pass ordinances to govern others, as the citizens of a town or city within their geographical limits. This power to legislate within the authority delegated to them by law is distinct from the power to contract, although exercised by the same corporation. * * * These two powers need not be confounded. The exercise of the legislative power requires the consent of no person except those who legislate; while it is impossible to make a contract without the consent of another, or others.
>
> * * * Nor can we see that the contract in the least restricts the legislative powers of the city, except that, as the sanctity of the contract is shielded by the Constitution of the United States, it can not, in the exercise of its legislative power, impair its validity; for it would be a solecism to hold that a municipal corporation can impair the validity of a contract, when the state which created the corporation, by its most solemn acts, has no such power."

Here South Bend has attempted by an *ex parte* ordinance, passed in the exercise of its legislative power, to revoke one-half of this contract, made in the exercise of its power to contract,—that is, cancel a part of a contract that was made by consent of both parties to it, without the consent of the other contracting party; and that, too, in violation of the Constitution of the United States.

In *The Western Paving and Supply Co.* v. *The Citizens Street Railroad Company,* 128 Ind., 525, touching the quality and character of an ordinance granted by the city, and accepted by the party in whose favor it was passed, the court said (p. 529):

> "It is settled that a charter granted by the common council to a street railway company to construct and operate a street railway within the corporate limits of a city, *constitutes a contract between such railway company and the city. Chicago* v. *Sheldon,* 9 Wallace, 50; *Coast-Line Railroad Co.* v. *Mayor, etc.,* 30 Fed. Rep., 646; *State ex rel.* v. *Corrigan, etc., Street R. W. Co.,* 85 Mo., 263; *District of Columbia* v. *Washington, etc., R. R. Co.,* 4 Am. and Eng. R. R. cases, 161; *Farrar* v. *City of St. Louis,* 80 Mo., 379; *New Orleans Gas Co.* v. *Louisiana Light Co.,* 115 U. S., 650; *Greenwood* v. *Freight Co.,* 105 U. S., 13; *New Jersey* v. *Yard,* 95 U. S., 104."

The same interpretation and construction was given to an ordinance in

> *The City of Indianapolis* v. *Consumers Gas Trust Company,* 140 Ind., 107.

This case involved the power of the City Council by a new ordinance forbidding digging into streets without a permit to repeal an earlier ordinance giving the Gas Company the right to lay its mains in the streets of the city and to take up said streets, on condition of properly restoring them, for the purpose of repairing said mains. The court held (p. 113):

> "At the time of the passage of the two ordinances mentioned, the City of Indianapolis was operating under the general statute of this state applying to cities, and the exclusive power

to regulate and control the use of its streets was clearly granted to it by the Legislature. * * * *This power to regulate, however, must be held not to carry with it the additional right to prohibit, annul or destroy rights arising out of contract.* This we think must be accepted as a well settled legal principle."

And at page 116, the court further said:

"Is the ordinance of 1890 (the first ordinance) a valid exercise of the police power which the city did not surrender in granting to appellee the franchise in question? There was no compulsion on the part of the appellant to grant the privilege to use its streets to any particular company. It was within its discretion to give or not to give its consent, and it had the right to withhold it from all gas companies. * * *

"It was not limited alone to the granting of this franchise, but it had the right to prescribe and impose terms and conditions. * * *

"When these terms and conditions, proposed by the appellant, were accepted by the appellee and complied with, it became a binding contract. *Western Paving & Supply Co.* v. *Citizens Street R. R. Co.*, 128 Ind., 531."

In Indiana, in the case of railroads, the franchise is granted by the state, with the power of operation only, through and over city streets, conditioned on the consent of that city.

An Act to provide for the incorporation of railway companies, approved May 11, 1852, being the act under which the predecessor of plaintiff in error was incorporated, reads as follows:

"Section 13. Every such corporation shall possess the general powers, and be subject to

the liabilities and restrictions expressed in the special powers following, that is to say: * * *

"Fifth. To construct their road upon or across any stream of water, water-course, road, highway, railroad, or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property, but the corporation shall restore the stream or watercourse, road or highway, thus intersected, to its former state, or in a sufficient manner not to have unnecessarily impaired its usefulness or injured its franchises."

* * * *

"Section XXI. * * * and nothing in this act contained shall authorize the said company to make a location of their track within any city without the consent of the common council of said city."

That a street is a highway within the meaning of this act is settled in *White* v. *The Chicago, St. Louis & Pittsburgh Railroad Company,* 122 Ind., 317, at p. 326, quoted under Point Seventh *infra.* That such a grant is irrevocable is further held in the authorities quoted above, particularly when acted upon, as shown in the other decisions cited under Point Seventh.

It is to be noted that no power to repeal, alter or amend is reserved in the power granted to the city to "consent." In the absence of such power the consent once given is irrevocable, not only under the decisions of the Indiana Supreme Court just referred to, but by the federal decisions on the many cases urged by fickle municipalities. Upon this very point Mr. Justice Lurton, speaking for the court, held in *Mayor, etc., of Knoxville* v. *Africa,* 77 Fed.,

501 (C. C. A., Sixth Circuit), a case involving similar statutes in Tennessee, as follows (pp. 507, 508):

> "Under the well-settled law of Tennessee the power to grant to a public corporation a right of way for the operation of public railroads, commercial or street, on or over a particular street or public highway, resides primarily in the Legislature of the state, but may be delegated to municipal governments. *Railroad Co.* v. *Adams,* 3 Head, 598; *Railroad Co.* v. *Bingham,* 87 Tenn., 522; 11 S. W., 705; Dill. Mun. Corp., Secs. 519-521. * * * A right of way upon a public street, whether granted by act of the Legislature, or ordinance of City Council, or in any other valid mode, is an easement, and as such is a property right, capable of assignment, sale and mortgage, and entitled to all the constitutional protection afforded other property rights and contracts. *City of Detroit* v. *Detroit Citizens St. Ry. Co.,* 22 U. S. App., 570; 12 C. C. A., 365, and 64 Fed., 628; *Louisville Trust & Banking Co.* v. *City of Cincinnati* (decided at present term), 76 Fed., 296.
>
> "In Tennessee two things seem essential to the legal maintenance and operation of a street railroad—a corporate organization, whereby the franchise essential to the operation of a street railroad for tolls is to be obtained; and the right to enter upon particular streets and occupy them with the necessary tracks and other equipment for the operation of a street railroad. The first requisite can be obtained only from the state by organization under the general incorporation law provided for those wishing such a franchise. To obtain the second requisite, the first essential is that the proper form for such a charter, being Sections 1920-1925, inclusive, Mill. & V. Code, shall be used. The code provisions referred to authorize the

organization of a corporation 'for the purpose of constructing a street railroad' in a particular city, to be named in the application. The same statute requires that this application shall set out the termini and general route of the proposed street railroad. Having completed the organization of such a company, it next becomes essential to obtain a right of way upon the streets embraced between the termini named in the charter and included in the route therein described. For this purpose power is given the company to contract with the city authorities for the needed grant, with the distinct and emphatic proviso that:

"'No one of the streets of said city shall be used by said company, nor shall any rails be laid down, until the consent of the city authorities has been first obtained, and an ordinance shall have been passed, prescribing the terms upon which the same may be done; or if the said road extend into the country, the consent of the county court must be first obtained.' Mill. & V. Code, Sec. 1921.

"As we have already seen, the power to grant a right of way upon the public streets resides primarily in the Legislature of the state. This power may be, and is, by the provisions of this street-railroad law, delegated to the municipal government of the city in which the proposed railroad is to be operated. This delegated authority is a trust, to be exercised for the public benefit by ordinance duly passed, and subject to the limitations and for the purposes intended by the statute. What is the extent of the power intrusted to the city government? The answer is plain. It is to 'consent' to the occupation of such of the streets of the city, between the termini named in the charter, and within the general route designated therein, as shall be deemed in the interest of the public. *The 'consent,' when given by ordinance duly passed, constitutes a grant of a right of way on and over*

the streets named or described in the ordinance, and constitutes a contractual ordinance, conferring an easement which is irrevocable."

To the same effect are:

City of Indianapolis v. *Consumers Gas Trust Co., supra,* 140 Ind., 107, at p. 116.

Western Paving & Supply Co. v. *Citizens Street R. R. Co.,* 128 Ind., 525, 529.

In the case of *City of Indianapolis* v. *Consumers Gas Trust Co., supra,* the question of the police power of the city was also to some extent involved. It is unnecessary to notice or discuss that question on this argument, because here the revoking ordinance does not present directly or indirectly any ground upon which a police regulation can be discussed or considered. Such police regulations we shall discuss later under Point Tenth.

If South Bend in its revoking ordinance had any right to revoke upon any ground upon which a police regulation might have been asserted, it should have been recited in that revoking ordinance as a ground for revocation. But even if it had been recited in this ordinance to revoke, as we have shown, that fact would not supply South Bend with the power to revoke.

Police regulations are for the regulations of persons and parties under ordinance contracts, and not to destroy the contracts. Police regulations may now be prescribed by South Bend for a safer operation of the tracks through these streets, but that is a very different question from an attempt on its part to destroy one-half of its contract. It is there-

fore not the question of regulation, but the question of destruction, that we present. The decision of the Supreme Court of Indiana in the case at bar (Rec., 45) is at variance with the above holdings, but under the ruling of this court in *Muhlker* v. *R. R. Co.*, 197 U. S., *supra*, the decisions first in point of time control.

Fourth.

We do not contend that the interest of the abutting owners can be destroyed or impaired under this or any other ordinance without compensation.

It was for this reason that the Grand Trunk took proceedings to appropriate, etc., and did pay damages to the abutting owners. With part of the abutting owners the Grand Trunk was able to agree as to compensation.

See amended complaint touching condemnation proceedings. (Rec., 11.)

It is sufficient to say that by condemnation or voluntary agreement the Grand Trunk acquired all of the right of the abutting owners to that part of the street from the bridge to Taylor street, upon which the railroad company laid its first track and proposes to lay its second track.

In speaking to this question the Supreme Court said, in *Burkham* v. *The Ohio & Mississippi Railway Company et al.*, 122 Ind., 344, 345:

> "We have no doubt that an abutting owner has a proprietary right in the street of which he cannot be deprived without compensation. *State* v. *Berdetta*, 73 Ind., 185, and cases cited; *Ross* v. *Thompson*, 78 Ind., 90; *City of Indianapolis* v. *Kingsbury*, 101 Ind., 200; *Town of*

Rensselaer v. *Leopold*, 106 Ind., 29. But it by no means follows from this that a city in granting a right to a railroad company to use a street deprives the abutter of his property. The grant by the municipal corporation transfers no proprietary rights of the abutter, it simply grants the privilege the city has power to grant. In granting such a privilege a city exercises a power delegated to it by the sovereign, and it is not liable for exercising such a power. *Port of Mobile* v. *Louisville, etc., R. R. Co.*, 84 Ala., 115 (5 Am. St. Rep., 342). Notwithstanding the grant by the municipality, the abutting owner has a right to recover such damages as he may have sustained by the additional burden imposed upon his land. *White* v. *Chicago, etc., R. R. Co.*, *ante*, p. 317. But the right of the abutter to compensation is against the railroad company, and not against the city."

The following decisions in Indiana are to the same effect:

Porter v. *Midland R. R. Co.*, 125 Ind., 476-481:

"A railroad company which obtains the privilege of using a street and pays damages to the adjoining owner secures the right to use the street in a reasonable and necessary manner."

Chicago, St. Louis & Pittsburgh R. R. Co. v. *Eisert*, 127 Ind., 156:

The city granted a right of way to the railroad company to lay tracks and improve the street, and the company prosecuted proceedings of appropriation and had assessment of all damages sustained by adjacent land owners. *Held* (p. 161), the use to be made of the property was in no way limited and the company had the right to lay one or more tracks in the street, and (p. 163) the words "line of the

railroad" as used in the ordinance refer to the outer rail of the track, the ordinance providing that the line of the track should not be brought within a certain distance of the curb.

Fifth.

The rule is well settled that under this ordinance containing no ground of forfeiture, a forfeiture cannot be declared or insisted upon for non-user until such forfeiture has been judicially declared in a suit brought for that purpose.

Please observe that this ordinance fixes no time within which either the single or double tracks shall be put in, and no date for commencing the work; not a single forfeiture clause appears in this ordinance; no right to repeal, modify or change or partition the ordinance is given either in the statute of the state under which South Bend possessed the statutory authority to make this statutory contract, or in the ordinance itself.

In *Logan* v. *V. G. & R. Ry. Co.*, 90 Ind., 552, at p. 556, the court said:

> "The appellant, in his reply, attempted to state facts showing, that under Section 3980, R. S., 1881, the Cincinnati and Terre Haute Railroad Company, by reason of its failure to perform certain acts, had forfeited all its rights, privileges and franchises. Whether the facts stated would, in a proper proceeding, be sufficient to authorize a judicial decree declaring a forfeiture of such rights, etc., is a question not necessary to decide. But the mode of proceeding to have such forfeiture declared is provided by statute. It is by information, on the relation of prosecuting attorney, in the Circuit Court of the proper county. Sections 1131-2,

R. S., 1881. The appellant's reply was bad, for failing to aver that the forfeiture of the rights, privileges and franchises of the Cincinnati and Terre Haute Railroad Company had been judicially declared in a suit for that purpose, at the instance of the state. *John* v. *F. & M. Bank*, 2 Blackf., 367 (20 Am. Dec., 114); *Covington, etc., Plank Road Co.* v. *Moore*, 3 Ind., 510; *State* v. *Trustees, etc.*, 5 Ind., 77; *Brookv., etc., Turnpike Co.* v. *McCarty*, 8 Ind., 392; *Stoops* v. *Greensburgh, etc., Plank Road Co.*, 10 Ind., 47; *Fort Wayne, etc., Turnpike Co.* v. *Dean*, 10 Ind., 563; *President, etc.*, v. *Hamilton*, 34 Ind., 506; *White* v. *State*, 69 Ind., 273."

It is clear that if the answer of South Bend would be fatally bad if it omitted to aver that the "rights, privileges and franchises" had become forfeited and that it had lost through such forfeiture the right to lay the additional track by non-user, abandonment, etc., then it would be equally ineffectual to have that answer made in the form of an argument in support of the demurrer.

The court, continuing on, says:

> "A text-book on railroads says: 'The non-user or misuser of its franchises by a corporation, or its breach of the conditions on which its duration is, by the law of its creation, made to depend, is a cause of forfeiture. Such defaults, however, do not of themselves work a forfeiture, but they take effect only when judicially determined in a direct proceeding instituted for that purpose."

Now, if the "non-user" or "misuser" by the Grand Trunk of the ordinance, franchise and contract, or if the Grand Trunk's breach of the conditions on which this ordinance contract depends, con-

stitute in any sense or degree a forfeiture thereof, then such forfeiture cannot be pleaded by South Bend in this case unless it has been judicially declared; and the ordinance revoking or attempting to revoke the same as to the right thereunder to lay the second track cannot be set up by South Bend by answer, and it would be equally futile to present it in argument.

In *Brookville and Greensburg Turnpike Company* v. *McCarthy*, 8 Ind., p. 394, the court quotes and approves the following language of Angell & Ames on Corporations:

> "It cannot be shown in defense to the suit of a corporation * * * that the plaintiffs have forfeited their corporate rights by misuser or non-user. Advantage can be taken of such forfeiture only by process on behalf of the state, instituted directly against the corporation for the purpose of avoiding the charter or act of incorporation, and individuals cannot avail themselves of it in collateral suits until it be judicially declared. A plea or answer, therefore, as a general rule, to the suit of a corporation showing facts upon which, in a direct proceeding, the corporate powers might be declared at an end, is not sufficient."

Now, if the executive and administrative officers of a state cannot declare forfeiture, cannot revoke any franchise granted by the state upon the ground that the franchise has become forfeited by misuser or non-user, excepting through judicial proceeding and decree so adjudging, how is it possible to hold that the City of South Bend might so adjudge by its City Council and evidence its adjudication in

council chamber assembled by this *so-called* ordinance of revocation for *non*-user?

Here it cannot be reasonably contended that the Grand Trunk lost its right in the street by abandonment of the exercise of its right in the street in question because it has always been in possession by itself or predecessor and in full use of the street to the extent it was entitled to occupy the street under the grant of right of way made by this ordinance contract for double tracks.

Sixth.

The grant having been made and acted on for over twenty years, the franchise cannot be successfully assailed and, viewed as a contract, it cannot be altered or repealed. Therefore the repealing ordinance of 1901 is void.

Observe, the City of South Bend did not attempt to revoke part of this ordinance contract upon the ground of non-user or upon any other ground for more than 33 years after this ordinance contract was made.

Observe, further, that the purchase of the abutting owners' interest in the right of way in the street for the second track was made over twenty years before the institution of this suit that condemnation proceedings were instituted against the abutting owners in all cases in which no agreement could be made and that, with full knowledge on its part, the City of South Bend **silently stood by and permitted the purchases to be made from the abutting owners, proceedings to condemn to be instituted**

and large sums of money to be paid out, without objection.

In paragraph 2, record 21, the petition avers and the demurrers admit as follows:

> "18. * * * And plaintiff avers that when it so acquired title to said railroad" (the railroad of the predecessor of plaintiff in error) "and took possession thereof it supposed and believed that * * * the ordinance hereinbefore mentioned enacted by the City of South Bend gave to the said Peninsular Railroad Company" (the predecessor of plaintiff in error) "the right to lay down a double track through said portion of Division street in the City of South Bend, between the bridge over the St. Joseph river in South Bend and Taylor street in said city and was valid * * * and under such supposition and belief and in good faith did proceed to lay down and complete a double track on its railroad along a large portion of its line, and at the time of the commencement of this action had expended in the construction of said double track over a million dollars. * * *"

Rec., 22, 23:

> "20. * * * that in the year 1881 the said Chicago and Grand Trunk Railway Company" (predecessor of plaintiff in error), "which company was then operating and maintaining said railroad, desired to acquire and perfect its title to the land used by it, and which it would be necessary to use in operating its road, as a right of way through Division street in said city, * * * and relying on the validity of said franchise and right of way to occupy said street, so granted by the said Common Council of the City of South Bend, on March 2, 1868, did, in accordance with the statutes of the State of Indiana, appropriate for its use as and for

a railroad track a strip of land eighteen (18) feet wide from north to south, extending from east to west along the center of Division street, from a point ten (10) rods, seven and one-half (7½) feet east of the east line of Michigan street in said city to General Taylor street. * * * And did in order to acquire and perfect its title to the said eighteen feet of land, so that it could lay down a double track thereon, institute proceedings for appropriation in the St. Joseph Circuit Court, and cause the interest of the owners in the fee of said land so taken and appropriated to be duly appraised and did pay to the various owners of said interest a full appraised value thereof; * * * and that the making of said appropriation and the purchase of said strip of land eighteen (18) feet wide were matters of public notoriety, and it was well known to the City of South Bend and the inhabitants thereof that the Chicago and Grand Trunk Railway Company was making such appropriation and condemnation of land * * * which it so intended to use for a double track and no objection whatever was made by the said City of South Bend to said acts of appropriation."

Rec., 23:

"21. And the plaintiff further avers that it also appropriated for its right of way over eighteen feet in width from a point ten rods, seven and one-half feet east of the east line of Michigan street to the bridge crossing the St. Joseph river, and paid for the same the sum of seven thousand dollars. * * *

"23. And plaintiff avers that since the year 1871, this company and predecessors aforesaid have openly, continuously and notoriously occupied the center of Division street with its said railroad from the west end of said bridge to

Taylor street, and have always claimed the right to lay down said double track across the St. Joseph river and along said Division street from the west end of said bridge to the center of General Taylor street aforesaid whenever the requirements of their business should make it necessary, and have expended large sums of money in the maintenance of said track and have complied with the conditions required of them by said ordinance with the full knowledge and acquiescence of the City of South Bend and the authorities thereof."

It is further averred, Section 24, Record, 23, that the grant in said ordinance of a right to a second track was intended for the accommodation of the railroad when its business should require a double track; that that condition has arrived and that the railroad was then double tracking its entire line and had already completed the work of laying a second track for upwards of 157 miles of said road.

The petition continues (Rec., 24):

"27. Plaintiff avers that at various and frequent times between the time of first building said existing track through Division street until the present time the said City of South Bend had ratified and confirmed said ordinance granted as aforesaid to said Peninsular Railroad Company by requiring this plaintiff and its several predecessors aforesaid and especially this plaintiff and said Chicago and Grand Trunk Railway Company to spend money in the changing of the grade of said track, in the planking and grading the same in the manner specified by said ordinance and even in a manner more expensive than so specified, also in lighting and watching crossings of plaintiff's said track with various streets in said city. All of said require-

ments were complied with, and said Chicago and Grand Trunk Railway Company spent large sums of money in so doing, to-wit, the sum of $5,000. And said plaintiff spent and must continue to spend large sums of money in so doing, to-wit, the sum of $3,000 annually, and in so doing relied on the position assumed by said city that said ordinance was in its entirety a valid and existing grant and that the same was so taken and treated by said city and that said city would not attempt to rescind said ordinance or any portion thereof.

"And plaintiff avers that by reason of the facts aforesaid the said City of South Bend is and should be stopped from * * * claiming or asserting that the plaintiff as assignee and successor of the first named Peninsular Railroad Company has not the right to lay down said double track in the portion of Division street hereinbefore mentioned."

Similar averments occur in the first paragraph of the petition, Sections 20 to 27½, Record, pp. 10 to 13.

That expenditures and acts, made and done with the knowledge of the municipality on the faith of an ordinance passed by the latter giving consent to the occupying of its street, as here, for railroad purposes, makes such an ordinance, even if viewed as a license only, irrevocable, is further held in the *Town of Newcastle* case, quoted, *supra,* 155 Ind., 18, at page 26, in the following express terms, uttered in adjudging a similar consent upon similar facts:

"But property that a municipality has the power to convey may be acquired from it by prescription. *City of Bedford* v. *Willard,* 133 Ind., 562; 33 N. E., 368; 36 Am. St. Rep., 563, and note. In *Jorgensen* v. *Squires,* 144 N. Y., 280; 39 N. E., 373, and in *People* v. *Collis* (Sup.), 45

> N. Y. Supp., 282, it was held that, the Legislature having authorized municipalities to grant property owners the right to build and maintain certain structures in the streets, the continued use of such a structure for more than twenty years, with the knowledge and acquiescence of the municipality, raised the conclusive presumption of a grant. *If the grant in this case be considered in the nature of a mere license, it has become irrevocable by reason of appellees' expenditures with the knowledge of appellant. Buchanan* v. *Railroad Co.*, 71 Ind., 265; *Joseph* v. *Wild*, 146 Ind., 249; 45 N. E., 467, and cases there collated."

In *State ex rel., etc.*, v. *Gordon et al.*, 87 Ind., 171, an information was filed in the name of the state and in the nature of *quo warranto*. The charge in this information was that for many years the respondent corporation "had been lawfully exercising the powers of, and acting as a corporation in the County of Shelby, under the name," etc.; that as such alleged corporation it had acquired and was using certain property and was usurping certain corporate franchises. The court said, at p. 173:

> "It is argued, in the next place, that, waiving all other objections which might be urged, the relators are barred from the prosecution of this information by lapse of time."

The court refers to and quotes from High, at Section 639, and then says, p. 174:

> "Angell & Ames on Corporations, at Section 743, lays down the rule that an information in the nature of *quo warranto* will be refused when the right of the defendant has been acquiesced in for a length of time.
>
> "At common law the time within which the

> title to a corporate office might be impeached was indefinite, varying with the circumstances of each particular case. At length, however, the Court of King's Bench set a limit to their discretion, and in the famous Winchelsea causes, publicly declared their resolution to be that after twenty years of unimpeached possession of a corporate franchise no rule would be granted against the person in possession to show by what right he held the franchise."

The bill shows that this corporate right and franchise to lay the double tracks in the street existed thirty-three years before any attempt was made on the part of South Bend to annul the same or any part thereof. That during all that time the Grand Trunk was in possession of its full strip and operating its railroad over one track, and that, as its business increased and demanded the full use of its right of way, it had proceeded to double track its whole line. Double tracking, moreover, is a great preventative of accidents by collision; but if every town and village along a road could revoke its consent to these contract-ordinances, no great double track trunk system could be completed.

The court in *State ex rel., etc.*, v. *Gordon, supra*, continued:

> "Lord Mansfield, in announcing their resolution, in the name of the court, said, 'that twenty years was the *ne plus ultra*, beyond which the court would not disturb a peaceable possession of a franchise; but that in every case within twenty years, their granting the rule or refusing to grant it, would depend upon the particular circumstances of the case that should be in question before them.' That court afterwards, in 1791, having come to the conclusion

that twenty years was much too long a period, limited their discretion in granting applications for information against persons in possession of a franchise to six years. This latter period was afterwards confirmed by Act of Parliament."

Bear in mind that during eleven years of this thirty-three years the Grand Trunk (plaintiff in error) and its predecessors were in possession of this franchise right, this contract right to occupy this right of way in this street for double tracks, and during the time of the entering into possession of this strip for double tracks, South Bend *was a stockholder of* the company, or a constituent of the company, in possession and enjoying the franchise created by grant and in full notice of all expenditures made on the right of way acquired, and acts done on the faith of this contract.

The court then refers to the following cases: *People* v. *Oakland County Bank,* 1 Doug. (Mich.), 282, in which the court held that seven years constituted *laches* sufficient to bar the right to institute proceedings in *quo warranto;* also citing *State ex rel.* v. *Baily,* 19 Ind., 452, in which the court held that *laches* for a period of eight years on the part of the state barred its right to attack the franchise upon the ground of non-user.

In *State ex rel.* v. *Gordon, supra,* the time was nineteen years, and the court held that that time constituted acquiescence and *laches* on the part of the state, and barred its right to question the franchise or to assert its forfeiture judicially upon the ground of non-user.

If the state would be barred by laches—by lapse of time, if party to this suit, how can South Bend escape the bar?

Seventh.

Mere failure to exercise the right to lay down the second track did not extinguish the right to do so. The grant was prospective and it was made in view of the extension of commerce and increase of business and the better development of the country.

The contention, if made, that the failure of the railroad company to lay the double tracks at the time it laid the single track, or that the failure of the railroad company to lay the double track, notwithstanding it acquired the title of the abutting owners as above shown, for the term of years since laying the single track, constitutes an abandonment of the ordinance or the right to lay the additional second track, cannot be maintained, for the reasons:

(a) It is not so provided in the ordinance contract.

(b) The ordinance contract does not make the right to lay the double tracks dependent upon the time within which they should be laid.

(c) The above grant from South Bend and the conveyances from the abutting owners *constitute title to the strip in the street.* The Grand Trunk as purchaser may use the same, in part or in whole, and its title is not affected by the non-use of any part thereof for any term of years.

The People's Pass. Ry. Co. v. *Baldwin, Chief Commissioner, etc.*, 14 Phila., 231, *is directly in point.*

The ordinance in that case granted the right to the company to lay a double track on Front street. Some time after the first track was laid the company laid a double track. The city ordered its highway or street commissioner to remove the double track, upon the ground that the right to lay the double track had been forfeited by delay. To prevent this threatened injury to the company, the company moved for an injunction, as was here done. The court said (p. 232):

> "It seems to have been supposed, and it was so argued, that when the company had laid a single track on Front street, it thereby exhausted all the power it possessed in the premises, and that it could not afterwards build an additional track. But this supposition is without any foundation in reason or authority. I know of no rule of law which obliges a corporation to exercise all its rights and franchises at once under the penalty of losing those which are not exercised immediately. Such a rule would be very unreasonable, for many powers are conferred upon corporate bodies with reference to a future exercise of them when their interests, their business or the public convenience may require it. As examples of this may be cited the cases of *The Philadelphia, Wilmington & Baltimore Railroad Co.* v. *Williams,* 4 P. F. Smith, 103" (54 Pa. St., 103), "and *Black* v. *The Philadelphia & Reading Railroad Co.,* 8 *id.,* 249" (58 Pa. St., 253).

Of one of these two cases (*Philadelphia, Wilmington & Baltimore R. Co.* v. *Williams,* 54 Pa. St., 103) the court said:

> "In the former case it was determined by the Supreme Court that the company, under a charter granted in 1831, might, more than *thirty*

> *years* afterwards, lawfully lay an additional track for a turn-out and siding, and that they were not restrained from doing so by a requirement in their charter that they should lay out and construct their road 'as soon as they conveniently could,' the court saying that this expression was not a limitation upon the power given which compelled the company to exercise its whole authority in the very beginning."

The suit now before this Honorable court requires the application of this rule in a far greater degree, inasmuch as no limitation, such as the clause, "as soon as they conveniently could," appears in this ordinance. This ordinance is without a single condition as to the time of performance.

The Pennsylvania court continued:

> "'It would be an unreasonable construction of its charter,' said the court, 'to require provision to be made for all the unknown wants of the future. The increase and trade and business and the changes taking place often require new and increased facilities.' In the other case cited it was held that the Philadelphia & Reading Railroad Company, under a charter granted in 1833, had the right in 1865 to construct a new track from their main stem to the River Delaware at Port Richmond. These cases sufficiently demonstrate that there is no rule of law in this state which requires a railroad corporation to *exercise all* the powers contained in its grant in the beginning, or which declares that those powers which are not then exercised are lost. * * * The laying of the additional track is but the completion of the original plan authorized by the legislature and approved by the councils. There is no warrant or justification therefore for the threatened destruction of the plaintiff's road by the city."

The injunction theretofore granted was ordered continued.

Now, it is clear that if the city could be lawfully restrained from taking up the additional track when laid it could be restrained upon the same ground from preventing the laying of an additional track. The reason and principle apply with equal force to both situations.

In *City of Columbus* v. *C. & S. Ry. Co.*, 37 Ind., p. 294, abandonment was charged against the railroad company and the facts upon which such abandonment was asserted *were set out and tested by demurrer.* It appeared that after a certain track in the city and along a certain street had been laid under ordinance of the city to be used as a part of that line, it was converted into a switch by reason of the change of ownership of the railroad. This change released the use temporarily of a part of the main line through the street and *left a gap.* The rails were taken out from this gap. Afterwards a controversy arose between the city and the railroad company in which the city asserted abandonment.

The court said, p. 299:

> "Do the acts alleged in the second paragraph show an abandonment of the right of way? It *is not claimed* that the company has abandoned the use of that part of the track in question, but it is insisted that the taking up of the rails at a point outside of the city, the transferring of them to the new track, and the promise to procure a release of the right which the company had to the way from which the rails have been removed, thus making it for the present, at least, impossible to use the track, as it origi-

nally was, continuously from the Jeffersonville, Madison & Indianapolis road to Shelbyville, on account of the gap thus made, and indicating by the agreement to procure a release of the right of way an intention to make this arrangement permanent, is an implied abandonment, or operates as an abandonment of the part in question. But it is urged by the appellee that the running arrangement with the Jeffersonville, Madison & Indianapolis Company may, for aught that appears, at any time terminate this arrangement, and as that company owns the new tracks, that it may at once assert this right, and thus leave the appellee without any track on which to run its cars, so far as the part of its line is concerned.

"It is the opinion of a majority of the court that the facts alleged in the second paragraph of the answer are not sufficient to show an abandonment of the right of way in the city, and that there was no error in sustaining the demurrer thereto."

The question under consideration was involved in the suit of *The City of Noblesville* v. *The Lake Erie & Western Railroad Co.*, 130 Ind., 1. In that case the right of way was granted to the railroad as shown in the plat of the subdivision of an addition to the City of Noblesville, and a donation thereof for that purpose. The railroad company took possession of part of that strip, and years later attempted to utilize the balance. The court in speaking of the location of the road said (p. 4):

"* * * that, while the streets are dedicated to the municipality, the dedication is limited by the donation made to the company of the right to use and occupy the streets with its tracks as indicated by the red lines on the plat. * * *

"The donation and the deed gave the appellee" (railroad company) "title, and, as there was title, it was not necessary that it should have taken *actual possession of all* the property granted it. Even where there is *no more than color of title*, actual possession of part is such possession of all the property as will give title by lapse of time. *Wright* v. *Kleyla*, 104 Ind., 223.

"The *pedis possessio* is only necessary where there is no color of title. It is clear, therefore, that the company acquired title to the entire easement granted by Conner, and that it has the right to lay the additional track which it proposes to construct, for that right is fully within its grant."

(NOTE: The italics are ours.)

White v. *The Chicago, St. Louis & Pittsburgh Railroad Company*, 122 Ind., 317, involved the building of an additional track in a street some years after the right to occupy the street had been given. The court (at p. 325) quotes several provisions of the statute under which it finds that the railroad was fully authorized to use the street for track purposes. One is as follows:

"Fifth. To construct its road upon or across any stream of water, waterhouse, road, highway," etc.

Touching this clause, the court said (p. 326):

"It is well settled that a street is a highway, and that the fee to the street is in the adjacent landowner, subject to an easement in the public."

The court then found from the findings of fact held by the court below that the abutters upon the

street involved had had their damages properly assessed and paid, and thereon held (p. 327):

> "By this appropriation the railroad company obtained the right to lay their track upon and use the street in question for the purpose of constructing and operating their railroad in as full and perfect a manner as might be required for the purpose of operating the road. * * * In the appropriation of a right of way, or the location of a railroad along, upon and over a street or highway, the location and appropriation are made with a view of future use and occupancy by the railroad company to the full extent and purpose as the future operation and business of the company may demand. It gives to the company, as against the property owners affected thereby, the right to use such right of way or street or highway upon which the road is located, a full and complete right to use the same for railroad purposes in as full and ample a manner as the necessity of the company may demand. * * * It is likewise evident that with the future development and improvement of the country along the line of the road the business of the road will increase, and with such increase of business a necessity will arise for additional tracks and switches."

So here, the contract right granted by South Bend and the rights purchased from the abutting owners are as complete in the case at bar for double tracks from the bridge to Taylor street as in the case cited; and while at the time the first track was laid there was no necessity for the second, that necessity has now arisen (Petition, 1st par., Sec., 24; Rec., 12), by reason of the increase and development of the business of the company and of the country.

The case above cited and quoted was affirmed and approved in

The Chicago, St. Louis & Pittsburgh Railroad Company et al. v. *Eisert,* 127 Ind., 156.

It appeared in that case that the ordinance authorized the railway company "to use so much of the street as was granted to them to be occupied for railroad purposes for the use of the company." The complainant by injunction sought to restrain the railroad company from laying down a second track. The complaint was sustained by the court below, and the laying of the second track was enjoined. On appeal this court said (p. 161):

> "As we have stated, the ordinance of the city granting the right to use the street for railroad purposes, and the record of the appropriation proceedings, were in evidence. The city ordinance and the appropriation gave to the railroad company full authority to use so much of the street as was granted to them to be occupied for railroad purposes for the use of the company. Upon such portion, if the business of the road required it, the company had a right to construct *one or more additional* tracks if there was sufficient room to do so."

Here the company has the express right by this ordinance contract to lay double tracks. The court continued:

> "The city ordinance did not limit its right to the construction of but one track, and the damages assessed under the appropriation proceedings covered all damages growing out of the necessary and legitimate use of such por-

> tion of such street for railroad purposes, whether it was occupied by one or more tracks. *White* v. *Chicago, etc., R. R. Co.*, 122 Ind., 317."

Now, if, as held in that case, a railroad company under an ordinance authorizing it to lay tracks is entitled to lay one or more as its business requires, how can it be held that under an ordinance which gives the express right to lay double tracks, half of it may be revoked or repealed by a municipal corporation without reserving the right to repeal and without the consent of the railroad company?

But the court in the *Eisert* case continued:

> "The appellee had *no* right to a restraining order preventing the construction of a *second* track in accordance with the right granted by the city ordinance," etc.

If the abutting owner in that case had no right to restrain the laying of the second track, then the city had no right in that case to have restrained such laying. If the city may revoke without consent, then the abutting owner may restrain from proceeding under the ordinance. *It cannot be possible that the city could revoke its ordinance grant, and at the same time the abutting owner could not revoke his.*

But this precise question was considered and determined by a very full and instructive opinion in

> *Africa* v. *Board of Mayor and Aldermen*, 70 Fed., 729, at page 731.

It appeared in that case that the original and succeeding companies built on one of the streets named

in the ordinance, and later on another one, *but not on all.* Thereafter, and

> "In July, 1892, the City Council of Knoxville undertook by ordinance to revoke its consent previously granted to the use of all streets not then occupied, with the exception of certain streets not necessary to be named. * * *
>
> "* * * Besides, this charter is in the usual form of such articles, and it is not to be doubted that within the limits of the state millions of dollars have been invested in such enterprises and the public greatly benefited thereby, both in transportation facilities to growing cities and in the revenue derived by the state from taxation. Sound public policy requires, as far as may be done, that invested capital should be protected by the state's laws and their construction by the courts, and not destroyed."

So here bear in mind the money invested on the street and paid to the abutting owners, and compare the population and business of South Bend now with its population and business at the date of this ordinance, and apply the rule stated by the court in the interpretation and construction of that statute as applicable to an ordinance passed for the same purpose.

The court continued:

> "It is next insisted by the defendants that any previously existing rights on any street *not actually occupied* and in use were taken away by the repeal of the ordinance in 1892, as before stated, and the plaintiff's contention is that the repealing ordinance is itself unconstitutional and void. In considering this question some general observations may be made. In the first place, it is to be borne in mind that plaintiff's franchise to operate his railroad is

not derived from the municipal corporation, *but* from the legislature itself; and it is none the less so because obtained under a general incorporation act, instead of a special statute, which is no longer constitutionally possible.

Telegraph & Telephone Co. v. *United States Electric Ry. Co.*, 93 Tenn., 502; 29 S. W., 104.

Memphis City R. R. Co. v. *Mayor, etc., of Memphis*, 4 Cold., 406.

People's Pass. R. Co. v. *Memphis City R. Co.*, 10 Wall., 38.

Citizens' St. Ry. Co. v. *City Railway Co.*, 56 Fed., 746.

"The *only* authority delegated to the city in the completion of the franchise rights *is the power to give its consent,* and to prescribe the terms and conditions on which the streets are to be used.

Mill. & V. Code, Sec. 1921.

"*The statute does not reserve to the City Council the right of repeal.* * * * Its power over the subject ends when it gives its consent, and prescribes the conditions in an ordinance for that purpose. * * * When it has given its consent it has executed and exhausted its power so far as the right to use the street is concerned. The Pennsylvania Supreme Court, in *Homestead St. Ry.* v. *Pittsburgh & H. Electric St. Ry.*, 166 Pa. St., 162; 30 Atl., 950, referring to the power and function of the city legislature in giving its consent, said:

" 'The municipal consent of itself can confer no right. The municipality has no power to confer the franchise. But it is the franchise, and that alone, which gives the legal right to build the railway. When the franchise is granted, authority is conferred to lay the track, and

it can then truly be said that the laying of a track is authorized. Municipal consent is only essential to the execution of the authority, not at all to its creation.'

"This leaves untouched questions of reasonable regulation, and of police power, and leaves also such terms and conditions as the city chose to require in the ordinance; *but it has no power of repeal.* The easement thus acquired over the streets of the city becomes at once property, and a property right, and is taxable as such.

Railroad Co. v. *Morrow,* 87 Tenn., 406; 11 S. W., 348.

New Orleans City & L. R. Co. v. *New Orleans,* 143 U. S., 192; 12 Sup. Ct., 406.

Railroad Co. v. *Delamore,* 114 U. S., 501; 5 Sup. Ct., 1009.

Detroit Citizens' St. Ry. Co. v. *City of Detroit,* 64 Fed., 628; 12 C. C. A., 365.

"The last case cited is well considered and instructive. And the grant of this franchise, when made by the state, and accepted by the company, becomes a contract between the state and the company, giving it a legal estate in the franchise named in the charter, and, being a contract, is under the Constitution of the United States, irrevocable and inviolable. * * * *And that this rule is applicable to franchises acquired in the streets of cities has often been decided, and is no longer open to question.*

City of St. Louis v. *W. U. Tel. Co.,* 63 Fed., 68.

Citizens' St. Ry. Co. v. *City Ry. Co.,* 64 Fed., 647.

Citizens' St. Ry. Co. v. *City of Memphis,* 53 Fed., 715.

Citizens' St. Ry. Co. v. *City Ry. Co.*, 56 Fed., 746.

Detroit Citizens' St. Ry. Co. v. *City of Detroit*, 64 Fed., 628; 12 C. C. A., 365.

* * * * * * * * *

"It is so held by the courts of last resort of the states of the Union by such number of states and by courts of such respectability as to make the authority in favor of the rule overwhelming."

(Citing a number of state courts holding such rule.)

"* * * Indeed, the cases upon this subject could be accumulated to a greater number, and it may not be out of place in this connection to say that the great number of cases in which it has become necessary for the courts to rule upon the question furnishes a somewhat *suggestive* lesson as to the freedom with which municipal legislatures in this country have undertaken to strike down enterprises which they were anxious to encourage in the first instance with liberal grants and large declarations of good faith. * * * The attempted repeal of the ordinance in this instance, so far as the record discloses, was *entirely* arbitrary, *without notice* to the company, and *without* giving it the benefit of any condition, time limit, *or* other opportunity to save its rights if it desired to do so. *No* demand in any form appears ever to have been made on the company to go forward with the work, or with its extension over any street. That the city was *without* authority from the legislature of the state to repeal this ordinance, and was without the constitutional power to do so, are questions upon which the court has no doubt."

The court concludes:

> "I am of opinion the consolidation in question worked a change of name, and that all of the rights and franchises, including the easement on the streets of Knoxville, of the constituent companies, belonged to the consolidated company, * * * and that under the statutes of this state the same passed under the lien of the mortgage, and were transferred by the foreclosure sale to the complainant. * * *
>
> "In the view thus taken of the case, * * * the ordinance passed pursuant to authority delegated to such municipality by the legislature becomes a contract as much as if it were granting the franchise itself, and is under constitutional protection as such; * * * The result is that the injunction is allowed."

Although the decree in this case was reversed, it was not reversed upon the above grounds. (77 Fed., 501.)

In *Brunswick Railroad Co.* v. *Mayor*, 91 Ga., 573, an injunction was granted on the motion of the city to restrain the company from constructing a sidetrack or "Y" with another railroad crossing Plant avenue. The purpose of the city in bringing the suit was to restrain the laying of this additional track on the street. The court, in reversing the decree and discussing that suit remarkably similar both in situation and principle to the present case, said (p. 575):

> "It is not denied that up to the time of the dedication, the company had the right to construct within this space as many additional tracks as its business might require. The right to build sidetracks and switches was incident to the use then existing. Before the company can

be held to have abandoned this right and to have excluded itself from the right of way except the part covered by the existing track, the intent must have been manifested clearly and unequivocally; and certainly no such intent is established by mere acquiescence in the use of the street by the public, if that use is not necessarily inconsistent with the extension of the railroad use. It is plain that these uses are not necessarily inconsistent. The exercise of the railroad use upon two tracks is not less consistent with the character of the *locus in quo* as a street than its exercise upon one. The public, after the extension, can continue as before to use the street at that point, and the public authorities can continue their control over it, and in the exercise of the police power can so regulate the manner of constructing and using the track as to reduce the danger and inconvenience to the public to the least degree practicable, where such a use exists. They may require the railroad company to provide safe crossings, to give warning of the approach of its locomotives and cars, and to reduce the speed within prescribed limits while crossing the street; and may prevent it from obstructing the street with standing cars beyond a reasonable time. In the case of *City of Noblesville* v. *Railroad Co.*, 130 Ind., 1, in which the city sought to prevent the railroad company from laying an additional track in a street which had been dedicated to the public subject to the right of the railroad company to build and operate its road therein, it was held that the company had not lost its right to lay the additional track, although more than twenty years had elapsed since the main track was laid; and it was said by Elliott, C. J., whose text-book on Roads and Streets is a leading authority on the subject: 'The occupancy of a highway by a railroad does not destroy its character. It remains a highway notwithstanding its use by the railroad company.' "

Eighth.

Even if South Bend had granted a license pure and simple to the railway company to occupy the street in question with railroad tracks, it could not be revoked after acceptance and use by the railway company.

In *Buchanan* v. *The Logansport, Crawfordsville & Southwestern R. W. Co.*, 71 Ind., 265, the court, in speaking of this question, said (p. 266):

> "The plaintiff, having granted the defendant license to enter upon the land, for the purpose of constructing a railway over it, and having knowledge that the defendant, acting on the faith of the license granted, had expended large sums of money, had no right to revoke the license which had authorized the entry upon the land and induced the expenditure of the money. The rule that a naked parole license may be revoked does not extend to cases where the licensee, relying upon the grant, has, with the knowledge of the licensor, expended great sums of money. This doctrine is a sound and salutary one, is well sustained by text writers and adjudicated cases, and has been often declared and enforced by this court."

To the same effect see:

Lane v. *Miller et al.*, 27 Ind., 534.

A number of other Indiana cases are cited by the court in *Buchanan, etc., supra.*

In no case can such an ordinance of revocation be held valid unless the revocation is attempted before the ordinance has been accepted, or money expended by the company under the ordinance.

This precise question was involved in *Town of Newcastle* v. *Lake Erie & W. R. Co., supra,* 155 Ind., 18, at p. 26:

> "But property that a municipality has the power to convey may be acquired from it by prescription. *City of Bedford* v. *Willard,* 133 Ind., 562; 33 N. E., 368; 36 Am. St. Rep., 563, and note. In *Jorgensen* v. *Squires,* 144 N. Y., 280; 39 N. E., 373, and in *People* v. *Collis* (Sup.), 45 N. Y. Supp., 282, it was held that, the Legislature having authorized municipalities to grant property owners the right to build and maintain certain structures in the streets, the continued use of such a structure for more than twenty years, with the knowledge and acquiescence of the municipality, raised the conclusive presumption of a grant. If the grant in this case be considered in the nature of a mere license, it has become irrevocable by reason of appellees' expenditures with the knowledge of appellant. *Buchanan* v. *Railroad Co.,* 71 Ind., 265; *Joseph* v. *Wild,* 146 Ind., 249; 45 N. E., 467, and cases there collated."

This same question was also involved in *Rio Grande R. R.* v. *Brownsville,* 45 Texas, 88. The court said (p. 96):

> "If they may revoke such consent, which, however, we are not called upon to decide in this case, it should appear it was done, and *notice of it* given the company *before* any action was had" (that is, before it had been accepted) "or expenditure was made on the faith of the consent or agreement. *But nothing* of the kind is alleged in the petition, or has been shown by the evidence. On the contrary, the inference to be drawn from the bill itself is, that appellant must have designated and surveyed its line, and had, probably, commenced work with-

> in the city limits before the repeal of the ordinance authorizing it to make its road on any street it might select, as shown by the statement of facts. If so, the repeal of the ordinance granting appellant the privilege of selecting and appropriating any of the streets and alleys of the city it chose, was clearly inoperative and *void.*"

The People ex rel. v. *West Division Railway Co.*, 118 Ill., 113, involved the effect of a contract ordinance between the city and a street railway company, and a later ordinance in which that contract was attempted to be changed, and by such change compel the street railway to extend its line. The court said (p. 119):

> "When the common council gave the railway company permission to occupy the streets of the city, *it then had the right to impose* such conditions in regard to the time within which the line of road should be completed as in its judgment the public interest of the city required, but *after it* had acted and its terms had been accepted, it would be manifestly unjust and unwise to allow the common council arbitrarily to impose other and different terms."

So here, South Bend had the power at the time it granted its consent by ordinance to the predecessor of plaintiff in error to occupy the street with two tracks to fix the time within which both of the tracks should be laid. *It did not do so.* If it is too late after the ordinance has been accepted, and after a single track has been laid, to fix the time within which the second track should be laid, it is equally

too late to repeal the first ordinance as to the right to lay the second track.

Hudson Telephone Co. v. *Jersey City*, 49 N. J. Law, 303, was a case in which it appears that the ordinance granted the right to the telephone company to lay poles and string wires on certain streets. This ordinance had been accepted by the company, and it had entered upon its construction work and had placed a number of poles on the streets covered by the ordinance. Later, and before the completion of the work, the city passed an ordinance seeking to repeal and extinguish this ordinance contract. The court said (p. 305):

> "I am of the opinion that as a general rule a designation of streets by a city gives the company an irrevocable right to use the streets so designated for the purposes indicated in the statute. Certainly, after the expenditure of money in the erection of poles, made in reliance upon the municipal designation, the company obtains a vested right of which they cannot be stripped by a subsequent revocation of such designation."

Ninth.

Ordinance 62 created a property right in the nature of an easement which the city has no power to destroy.

In *Tate* v. *The Ohio, etc., R. R. Co., supra*, in defining the right of the abutting owner, or rather the title of the abutting owner, the court said (p. 483):

> "The case of *Haynes* v. *Thomas, ante*, p. 38, is directly in point. That case, as to the question now presented, received greater consideration, and the following is the conclusion at which

> we arrived: 'The right to use a street in a town adjoining a lot abutting upon it, is as much property as the lot itself; and the legislature has as little power to use the one as the other.' "

If South Bend had vested in the railroad company by this ordinance contract the right to lay these two tracks in this street, and after the railroad company purchased this title, as defined by the Supreme Court of Indiana in the *Tate* case, upon an eighteen-foot strip in the street, upon which to lay both tracks, at an expenditure of $13,000, what would be the situation of the parties if South Bend was allowed to revoke this ordinance contract as to the second track, with the title in the railroad company of the strip for both tracks?

Now, if in the proceedings to appropriate this eighteen-foot strip in this street for that purpose, the two tracks were mentioned, and it was to revert in case the strip was not used for the purpose described in the petition to condemn, then what would be the right of the abutting owner for the non-use of such strip for a second track as against the railroad company, and how much of that strip would revert?

In *Mayor, etc., of Knoxville* v. *Africa, supra,* 77 Fed., 501, at 507, Mr. Justice Lurton held:

> "A right of way upon a public street, whether granted by act of the Legislature or ordinance of City Council or in any other valid mode, is an easement, and as such is a property right, capable of assignment, sale and mortgage, and entitled to all the constitutional protection afforded other property rights and contracts."

Plaintiff in error is therefore entitled to invoke Amendment XIV to the Constitution of the United States, which the City of South Bend has violated in attempting to deprive the Grand Trunk Western Railway Company of its property, this easement for a double track, without due process of law.

Tenth.

Distinction between regulation and destruction under police power, the necessity required and degree of reasonableness demanded for the exercise of such power in each case.

The Indiana Supreme Court has failed to distinguish between regulation and prohibition, and also between the presumption indulged as to the reasonableness of a mere regulating ordinance where the power to enact a particular character of by-law is expressly given, and the rule that a presumption of reasonableness will not be indulged where the taking of property, or destroying the use thereof is affected by an ordinance, and no necessity shown therefor, while, on the other hand, facts are set up by the petition attacking such ordinance, admitted by demurrer, which in themselves are sufficient to overcome even a presumption in favor of regulation. Where, however, even a mere regulation affects property, it is not necessary to allege bribery, corruption or fraud to overcome the *prima facie* presumption of reasonableness, but facts which tend to show that such an ordinance is arbitrary, unjust or not required by circumstances will be sufficient to invalidate an attempt by the City Council to enforce such a regulation which involves the

expenditure of money on the part of the subject of the regulation or the injury of his property.

However, even admitting a presumption in favor of reasonableness, where the subject matter of the ordinance is purely that of regulation, this presumption does not and cannot apply to an ordinance which takes away property or property rights already acquired. The cases cited by the Supreme Court of the State of Indiana were in every instance except one, which we shall distinguish hereafter, cases that involved regulation merely and not prohibition. To control the speed of a train, require flagman or gates at a crossing, determine the manner of paving the right of way or intersections thereof with sidewalks and streets, to order culverts and drains, to require changes of grade and opening of streets across the right of way, to pass ordinances for fencing right of way, or otherwise protecting the public from danger from passing trains, to control the smoke nuisance, to determine the lighting, heating and equipment of passenger trains so as to insure the comfort, convenience and health of passengers—all these are matters of regulation which, when reasonably exercised, are within the power of the Legislature originally and may by it be delegated to the municipality. None of these things interfere with the right of property of the railroad in its right of way; they merely regulate its use thereof. They take nothing from the company except the expenditure of money necessary to put in the required improvements, or employ the necessary workmen. They all fall under the police power and the very cases and the very authorities

by which the court below endeavored to show that some of them are not within the police powers, but relate merely to the business capacity of the city, show not only that these regulations are within the police power, but that in certain instances they can be controlled by contract and that the necessity for abrogating such a contract must be shown.

But the taking of private property or property of a *quasi* public corporation, or destroying the use thereof, while it may perhaps be justified on extreme grounds of public necessity, can only be justified on such grounds actually shown. No necessity is shown for such an act in a mere ordinance authorizing the taking of such property, or destruction of such use, nor can a presumption of reasonableness be indulged in, in the face of allegations of facts showing the unreasonableness and arbitrariness of such an act, which allegations are admitted by demurrer.

In *Hawes* v. *City of Chicago*, 158 Ill., 653, the Supreme Court of that state laid down the following doctrine (p. 657):

> "An ordinance must be reasonable, and if it is unreasonable, unjust and oppressive the courts will hold it invalid and void. (*City of Chicago* v. *Rumpff*, 45 Ill., 90; *Tugman* v. *City of Chicago*, 78 *id.*, 405.) The question of the reasonableness or unreasonableness of a municipal ordinance is one for the decision of the court, and in determining that question the court will have regard to all the existing circumstances or contemporaneous conditions, the objects sought to be obtained, and the necessity or want of necessity for its adoption. (*Toledo, Wabash and Western Ry. Co.* v. *City of Jacksonville*, 67 Ill., 37; *City of Lake View* v. *Tate*, 130 *id.*, 247; 1 Dillon on Mun. Corp., Sec. 327.)

> And even where the power to legislate on a given subject is conferred on a municipal corporation, yet if the details of such legislation are not prescribed by the Legislature, there the ordinance passed in pursuance of such power must be a reasonable exercise thereof, or it will be pronounced invalid. 1 Dillon on Mun. Corp., Sec. 328; *City of St. Paul* v. *Colter*, 12 Minn., 41; *Dunham* v. *Trustees of Rochester*, 5 Cow., 462; *Breninger* v. *Belvidere*, 44 N. J. Law, 350."

That this doctrine applies even to ordinary police regulations that control the use of property without taking such property, or destroying the use thereof, is clearly shown by the foregoing quotation and the authority cited thereunder, and especially in the case of the *Toledo, Wabash & Western R. Co.* v. *City of Jacksonville*, 67 Ill., 37.

That case was an action brought to recover a penalty for the failure to comply with an ordinance of the city which required the railroad company to keep a flagman by day and a red lantern by night at a certain street crossing. The case was treated as though the city had the right by its charter to exercise "all the power in the regulation of its domestic affairs that the state could do for the general welfare of the people." The court held (p. 40):

> "There can be no question that railway corporations are subject to police regulations as well as private citizens. The general assembly, when the public exigencies require it, has power to regulate corporations in their franchises so as to provide for the public safety. The exercise of this right in no manner interferes with or impairs the powers conferred by their acts

of incorporation. *The G. and C. U. R. R. Co.* v. *Loomis*, 13 Ill., 548; *Thorpe* v. *Rutland and Burlington R. R.*, 27 Ver., 140.

"Under this power it has been held that the Legislature may require railroad corporations, notwithstanding no such right has been reserved in the charters, to fence their tracks, to put in cattle guards, to place upon their engines a bell, and to do many other things for the protection of life and property. This power is inherent in the state, and it can not part irrevocably with its control over that which is for the health, safety and welfare of society.

"*But such regulations must be what they purport to be, police regulations, and must be reasonable when applied to corporations or individuals. What are reasonable regulations, and what are subjects of police powers, must necessarily be judicial questions. The law-making power is the sole judge when the necessity exists, and when, if at all, it will exercise the right to enact such laws.*

"Like other powers of government, there are constitutional limitations to its exercise. It is not within the power of the general assembly, under the pretense of exercising the police power of the state, to enact laws not necessary to the preservation of the health and safety of the community that will be oppressive and burdensome upon the citizen. If it should prohibit that which is harmless in itself, or command that to be done which does not tend to promote the health, safety or welfare of society, it would be an unauthorized exercise of power, and it would be the duty of the courts to declare such legislation void."

The court further held that the ordinance in that case imposed an unreasonable burden upon the railroad company, in that there was but a single track at that point, and the number of trains passing

thereover, the amount of travel, the location of the crossing and the population, did not justify putting such a burden upon the company.

In another aspect of the exercise of police power, namely, street paving, generally admitted to be unquestionably within the control of a city, the Supreme court of Indiana has held that one method of paving the portion of the street included in a railroad right of way having been definitely fixed by contract-ordinance, the city could not require the railway company to pay for, or to put in a different and more expensive pavement.

Western Paving and Supply Co. v. *Citizens Street R. R. Co.*, 128 Ind., 525.

And yet these cases present two of the most familiar aspects of the exercise of the police power by ordinance of a city, the one for the protection of the lives of its citizens, and the other for their convenience and safe travel. If such regulations must be reasonable on their face, and if any presumption of the reasonableness of such regulations can be overcome by undisputed facts (whether of proof or by averments in a petition admitted by the demurrer, as here) which tend to show that such regulations are unnecessary and nót required by the circumstances of the case, much less can an ordinance which destroys the use of property acquired under the grant of the Legislature and consent of the city be held valid and reasonable, when there is no recitation on the face of the ordinance showing justification for such destruction of property rights, and when, on the contrary, the petition which attacks

the validity of such ordinance sets up within itself a state of facts admitted by demurrer, that would conclusively rebut any possible presumption of reasonableness that might inhere even in a regulating ordinance, which does not purport, as this ordinance actually does attempt, to destroy the use of property.

Lake View v. *Rose Hill Cemetery Co.*, 70 Ill., 191, presents a state of facts far stronger in favor of the *prima facie* justification of the exercise of police power than the present case, and declares the rule in clear terms and exact accord with the distinction we have above laid down. In that case the cemetery company had been created a corporation by the Act of the 11th of February, 1859, "with power to acquire, hold and use lands, not exceeding five hundred acres, in the Town of Lake View, for cemetery purposes. The company was authorized, by its charter, to lay off and plat its grounds, to erect all necessary buildings, and to do all other acts that might be necessary to prepare them for the purposes intended. Its organization was completed, and a part of the lands purchased were inclosed and platted, and large sums of money have been expended in beautifying and preparing the grounds. The lands are situated near the lake shore, about seven miles north of the courthouse in the City of Chicago, and three or four miles north of the northern limits of the city."

The Town of Lake View filed a bill under a certain act enacted by the Legislature of the State of Illinois, on March 29, 1869, to restrain the cemetery company from using certain of those lands. The court, after stating the plenary power of the

state, which enables it to prohibit all things hurtful to the comfort, safety and welfare of society, and its jurisdiction to control the use of property of corporations as well as private citizens, held (p. 195):

> "As a general proposition, it may be stated, it is the province of the law-making power to determine when the exigency exists, calling into exercise this power. What are the subjects of its exercise is clearly a judicial question. There must necessarily be constitutional limitations upon this power. It is essential that such regulations must have reference to the comfort, safety or welfare of society, and, when applied to corporations, they must not be in conflict with any of the provisions of the charter. It is not lawful, under the pretense of police regulations, to take from a corporation any of the essential rights and privileges conferred by its charter. Potter's Dwarris on Statutes, 458; Cooley on Const. Lim., 577. The right to control is essentially different, and rests on a different principle from the power to repeal, alter or amend charters of private corporations."

And on page 197 it was further held:

> "In the case at bar, by the provisions of its charter, the company was authorized to buy and hold land not exceeding a certain quantity, and to use it for cemetery purposes. This it can rightfully do, and while the state has the unquestionable power to regulate the manner of its use, so far as it may injuriously affect others, it cannot, under the pretense of making police regulations, repeal its charter and revoke its franchises or deprive the company of any of the essential rights conferred by its charter.
>
> "The act of the Legislature does not profess

to correct any abuses in the use of the property, but is an arbitrary prohibition of its use in accordance with the provisions of a charter previously granted. Upon what principle can such a law be maintained, or what 'overruling necessity' was there for its enactment? There is no pretense the cemetery, as constructed, is a nuisance, nor is there any charge that the health or comfort of the people in the vicinity has been or will be affected in the near or even in the distant future. If it can be maintained at all, it must be by some absolute power by which the General Assembly, it being the sole judge of the extent of its powers, may declare what shall and what shall not be independently of all constitutional restrictions. Reference is made to the reserved power of the state, denominated 'police power,' as affording the requisite authority. It has been said the source of this extraordinary power may be readily recognized as flowing from the people in their organized capacity, inalienable in its character, but that it is difficult to define its boundaries or limit its operations. We are unwilling, however, to concede the existence of an indefinable power, superior to the Constitution, that may be invoked whenever the Legislature may deem the public exigency may require it, by which a party may be capriciously deprived of his property or its use, without compensation, whether such property consists of franchises or tangible forms of property. The Constitution expressly provides the right of property shall remain inviolate, and, upon all enumerated subjects, it must constitute a limitation on the exercise of all power, no matter what its nature may be, nor whence its origin. If such was not the case, there could be no constitutional security for private rights, and the citizen would hold his property, corporeal or incorporeal, by a most uncertain tenure.

"In this instance, if the General Assembly can rightfully prohibit the company from using its lands previously purchased, which lie outside of the present inclosure, for cemetery purposes, as authorized by its charter, upon the same principle it could prohibit the use of the now unoccupied portion of the inclosure, and as the property is valueless to it for any other purpose, and as the company could not lawfully use it, in any event, for other than burial purposes, it would amount to a deprivation of its use, and almost a total destruction of its value. The franchises conferred by the act of incorporation would be rendered valueless, unless they could be employed in the use of the lands previously purchased, and the capital invested in them would be imperiled, if not wholly lost. * * *

"Under the power to regulate, the state cannot deprive the citizen of the lawful use of his property, if it does not injuriously affect or endanger others. * * * In view of this constitutional guaranty, it can not be said that every legislative enactment that affects the interest of the citizen is necessarily the 'law of the land.' Such a construction would render nugatory every constitutional provision intended for the protection of private property."

The petition avers (Rec., 11) that the plaintiff in error has appropriated and is in possession of a right of way over eighteen feet in width in Division street, which it appropriated and is occupying for the purpose of laying therein double tracks (Secs. 20-23).

And (Rec., 12):

"26. It is furthermore apparent, and plaintiff avers the fact so to be, that the obstructing of the general public in the use of said street

by passing trains will be much less when two tracks are used than it now is when all trains, both ways, have to pass over a single track, that said street is 82½ feet wide and that there is ample room thereon for general travel and for said double track."

The facts averred in the complaint and admitted by the demurrer have the following effect:

(a) They conclusively overcome any presumption that otherwise might arise in support of the reasonableness or the validity of the repealing ordinance, or justification for its passage.

(b) They are material facts and not conclusions of the pleader, as held by the Indiana court. They show clearly the capacity of Division street for public travel and double tracks.

(c) They further show that there was no necessity for the repealing ordinance; that it was unreasonable and operated to impair the obligations of the contract part of Ordinance 62.

We submit that the Supreme Court of Indiana misapprehended the force of the statements and averments of facts recited in the complaint. We submit that the width of Division street and of the 18-foot strip in the center acquired by the Grand Trunk, over which to lay the double track, and over part of which it has laid a double track, and used the same for nearly thirty years, without complaint or inconvenience to public travel over the street, and other facts of record, the truth of all of which is admitted by the demurrer, are sufficient to show that ordinance-contract 62 was not only authorized by statute but that it was reasonable, and that the pub-

lic interests and public travel were fully and adequately protected, and that the repealing ordinance was not only unreasonable but wholly unnecessary.

It is apparent that the obstruction of streets by passing trains is much less when the business is heavy and there are two tracks over which to move the trains than where there is but one.

Now this is none the less a statement of fact because it is impossible to give the exact tonnage of the increase, or to state the exact amount that will be carried over each of the two tracks.

This so-called conclusion, this statement that there will and must be a greater obstruction in the streets by the movement of a large volume of traffic over one track than over two tracks, using both continuously for passing tracks, so that no trainload, no engine will be compelled to wait on one track until long trains and engines pass on the other, is a thing that ought to be judicially noticed by a court. Otherwise the court would indulge in the presumption that the expenditure of many millions of dollars for the construction and equipment of double tracks from the Atlantic to the Pacific is a mistaken waste and embarrasses rapid transit rather than to expedite the heavy and repeated movements of traffic by train loads both ways at the same time. That is, that you could move heavy volumes of freight both ways between the Atlantic and Pacific over a single track more expeditiously and cheaply than it could be if divided and moved over double tracks, one-half each way at the same time. Is that true? IT CERTAINLY WOULD TAKE TWICE AS LONG TO PASS A GIVEN NUMBER OF CARS OR TRAINLOADS OVER A GIVEN PORTION

OF A SINGLE TRACK, THAN IT DOES IF THE SAME VOLUME OF TRAFFIC IS DIVIDED AND ONE-HALF PASSES OVER ONE TRACK AND THE OTHER HALF OVER ANOTHER PARALLEL TRACK AT THE SAME TIME. THIS IS THE MORE APPARENT WHEN PART OF THE TRAFFIC IS MOVING IN ONE DIRECTION AND THE REMAINDER IN THE OPPOSITE DIRECTION. BY THE USE OF TWO TRACKS DIVISION STREET WILL BE FREE FROM THE OBSTRUCTION OF PASSING ALL TRAINS OVER A SINGLE TRACK WITH THE USE OF PASSING TRACKS LOCATED AT DIFFERENT POINTS ON THE SINGLE TRACK, AND AT WHICH PASSING POINT ONE OF THE TRAINS MAY BE HELD FOR HOURS WAITING FOR THE OTHER TRAIN, IF DELAYED, WHILE ON DOUBLE TRACKS ONE TRAIN IS NEVER DELAYED FOR THE OTHER, AND THEREBY OPEN THE 18 FEET TO THE PUBLIC FOR TWICE THE TIME THAT IT NOW IS BY THE USE OF ONE TRACK FOR ITS PRESENT VOLUME OF BUSINESS. It conclusively follows, therefore, that the obstruction will be less with two tracks in Division street than with a single track. It would hardly be contended that a street wide enough to permit travel both ways at once would be more obstructed by traveling both ways at the same time than if all of the travel was required to go one way.

THE 18 FEET ACQUIRED FOR DOUBLE TRACKAGE AS HERETOFORE SHOWN LEAVES 64½ FEET FOR THE PUBLIC AS A STREET.

That this 18 feet is sufficient for the two tracks is shown by the following averment of the petition, admitted by demurrer:

> "* * * that on the first day of January, A. D. 1881, said Chicago and Grand Trunk Railway Company did lay down a double track

> on Division street between the St. Joseph river and Michigan street and it and its said assigns have ever since used and the plaintiff still uses the same." (Complaint, par. 1, Sec. 27½; Rec., 13.)

This court need not be told that only the very largest streets in any ordinary city are wider than 64½ feet, and as a rule they are boulevards on which no traffic except that of pleasure is allowed.

In *White* v. *Chicago, etc., Ry. Co., supra,* the street involved was 60 feet wide. A single track had been in operation for years. An additional track was laid in the center, making a double track in this 60-foot street, and the same was not disturbed by this court.

In *People, etc., of Michigan ex rel. Kunze* v. *R. Co.,* 16 L. R. A., 752, decided by the Supreme Court of Michigan, this precise question was involved. The court found that the street was 50 feet in width "and the paved portion" was 35 feet.

The ordinance gave it the right to construct a single railway track in the middle of the street. The gauge of the track was *4 feet 8½ inches,* and the width of a close car was 7 feet and 9 inches, leaving a space of nearly 9 feet for the passage of vehicles. The court then found (p. 753):

> "This is sufficient width to admit of the passage of ordinary vehicles, and the ordinance is not, in my opinion, so unreasonable as to require the interference of the court, if it be held that an ordinary street railway is not in and of itself an additional servitude."

If a 50-foot street was sufficient or if 35 feet of the 50-foot street was sufficient for the construction and operation of "a single railway track in the middle of the street," in that case, can it be questioned or doubted that a street, 64½ feet exclusive of the 18-foot strip for railroad track in the center, is amply sufficient for public travel and for *a double* track in this case?

Moreover the repealing ordinance, which is indivisible, does not purport to distinguish between a track laid down and that to be laid down, and which was passed October 14, 1901, ten years after plaintiff in error had already laid a double track on a portion of Division street under Ordinance Contract No. 62 (Rec., 13), repealed the whole of plaintiff in error's right "to maintain a railroad in said Division street as gives the right to maintain a railroad in said street"; that such an attempted repealing ordinance is unconstitutional, null and void, is held in the cases cited under Points 3 and 7 of this argument, and particularly in *Town of Newcastle v. Lake Erie Co.*, 155 Ind., 18, which has been quoted so fully earlier in the brief that a mere citation is sufficient. The authorities cited by the court below in both its original opinion and that on the petition for rehearing consist of cases that deal with police power in its application to regulation or control, which are not disputed by plaintiff in error. They have none of them touched the question of the power of the municipality having given consent for the operation of the grant of the state to its streets, to withdraw that consent and destroy the property acquired on the faith thereof.

The case of *Vandalia R. R. Co.* v. *South Bend*, 166 Ind., 219, so much relied on by the court below, deals with the control of the city over its graded crossings, and the other cases deal with kindred subjects.

No case in the Supreme Court of Indiana on all fours with the present case, involving the taking of a portion of the right of way or the destruction of its use by the municipality, has been cited by that court or opposing counsel up to this moment, but as shown under Points 2, 3 and 7 in this brief, the decisions first in point of time in the Supreme Court of the State of Indiana have held that a grant such as that conveyed in Contract Ordinance No. 62 was within the power of the city, was effectual and could not be revoked.

Counsel for appellees may cite *Baltimore* v. *Baltimore Trust Co.*, 166 U. S., 673. Observe, however, that in that case there was a reservation of power to enforce, amend or repeal, and the original contract was entered into subject to the right of the city to adopt such regulation, and it further appeared in evidence in that case that the street occupied by the railroad was *very narrow, and using it for a double track was substantially depriving the people of a right of passage and creating actual danger.* On these latter points the court lays particular emphasis (pp. 683-84) and on those conditions of *fact* bases its decision on the reasonableness of that ordinance. In the case before us it is alleged in the amended complaint that the road was 82½ feet wide and of ample width to accommodate both railroad trains and the public in passing along the same, all

of which is admitted by the demurrers of the defendants.

City Railway Co. v. *Citizens' Street R. Co.*, 166 U. S., 557, involved the right of the Citizens' Street Railroad Company of Indianapolis, Indiana, to operate a street railroad upon the streets upon which it had constructed its tracks, and the validity of a certain ordinance granting a similar right to another street railway company, thereby abridging the rights of the first named company in the use of the streets. This court held (p. 563):

> "That the complainant had a contract with the city is entirely clear. It was so held by the Supreme Court of Indiana in *Western Paving & S. Co.* v. *Citizens' Street R. Co.*, 128 Ind., 525 (10 L. R. A., 770), in which the liability of the company for certain street improvements was discussed and passed upon. It is true that, by Section 11 of the original act of 1861, a right was reserved to the General Assembly to amend or repeal at their discretion the act authorizing the incorporation of street railway companies; but that was a right reserved to the General Assembly itself and was never delegated, if in fact it could be delegated, to the Common Council of the city.
>
> "That the city did attempt to impair this contract by the agreement of April 24, 1893, with the City Railway Company, and its ordinance ratifying the same, is equally clear. This contract was entered into in pursuance of a supposed right given by the act of the General Assembly of March 9, 1891, known as the City Charter, the fifty-ninth section of which enacted that 'the board of public works shall have power * * * to authorize and empower by contract telephone, telegraph, electric light, gas, water, steam or street car or railroad companies to use any street, alley or other public

> place in such city; * * * provided, that such contracts shall, in all cases, be submitted by said board to the council of such city, and approved by them by ordinance before the same shall take effect.' This contract and ordinance of April 24, 1893, even if otherwise valid, could not be construed to interfere with the rights of the complainant to occupy the streets of the city under the Act of 1861, and the ordinance of January 18, 1864, without coming in conflict with that provision of the constitution which forbids states from enacting laws impairing the obligation of contracts.
>
> "* * * No formal resolution of acceptance is necessary in any case, if the facts show an actual, practical acceptance by the company, or action which would be only explicable in case the amendment (the ordinance contract there under consideration) were accepted. * * * We are also of the opinion that an acceptance may be presumed from the fact that the amendment was beneficial to the corporation." (Citing authorities.)

In *Board of Mayor, etc.*, v. *East Tenn. Tel. Co.*, 115 Fed., 304 (Circuit Court of Appeals, Sixth Circuit), Mr. Justice Lurton, speaking for the court, held:

> "The acceptance of the grant by writing and by acts prior to the repealing ordinance was, in our judgment, such as to give the ordinance, so far as valid, effect as a contractual ordinance, and render it irrevocable.
>
> "Street rights so vested cannot be divested without the consent of both parties or by clear acts of abandonment indicating an intention not to accept. *Louisville Trust Co.* v. *City of Cincinnati*, 22 C. C. A., 334; 76 Fed., 296. The street rights thus granted are, of course, subject to the provisions of the ordinance itself, as

well as the police power of the city, which can never be contracted away."

It is not contended by plaintiff in error that the defendant in error has contracted away its police power to supervise the operation of the trains of plaintiff in error in Division street, such as limiting their rate of speed or requiring watchmen at crossings, but the claim of plaintiff in error is that defendant in error having contracted with plaintiff in error for the privilege of laying a double track in Division street, that the grant when acted upon and complied with by plaintiff in error by the expenditure of money in making street improvements and by performing all the other conditions of the grant became a contract inviolable and not subject to revocation by the city without the consent of plaintiff in error.

Respectfully submitted.

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No. 81

IN THE

Supreme Court of the United States

October Term, A. D. 1912.

GRAND TRUNK WESTERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

CITY OF SOUTH BEND et al.,
Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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IN THE

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OCTOBER TERM, A. D. 1912.

GRAND TRUNK WESTERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
CITY OF SOUTH BEND ET AL,
Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT.

The amended complaint of plaintiff in error discloses that the city of South Bend, Indiana, defendant in error on March 2, 1868, passed Ordinance No. 62 authorizing the Peninsular Railroad Company, predecessor in title of the plaintiff in error, to construct a railroad track on Division Street of that city, the ordinance providing only one track should be laid without the previous assent of the common council of the city except the privilege of laying a double track from the western terminus of the bridge across the St. Joseph River in that city westerly along Division Street to General Taylor Street. It also appears from the allegation in the amended complaint that no right was grant-

ed to plaintiff in error or its predecessor under this ordinance, nor in any other manner has it acquired any right, to construct more than one track from General Taylor Street westerly on Division Street to or beyond Laurel Street, and that under Ordinance No. 62 the predecessor in title of plaintiff in error had, many years prior to the commencement of this action, constructed, maintained and operated a double track railroad from the western end of its bridge over the river westerly along Division Street to the east side of Michigan Street (which is east of General Taylor Street), and a single track only westerly on Division Street from Michigan Street to Laurel Street and beyond.

On October 14, 1901, thirty-three years after the adoption of Ordinance No. 62 and before a second track had been laid on Division street between Michigan Street and General Taylor Street, the common council of the city repealed so much of Ordinance No. 62 as permitted the construction of a double track on Division Street, and since the adoption of the repealing ordinance the city has denied the right in the railroad company to lay an additional and second track on Division Street from Michigan Street to General Taylor Street. On October 6, 1902, the city interfered with an attempt to lay the additional and second track on Division Street from Michigan Street to Taylor Street, but no averment or claim is made in the amended complaint that there was any attempt or threat made by the city to interfere with the use and operation of the double track which had been laid prior to the passage of the repealing ordinance from the western terminus of the bridge to Michigan Street. It also appears that the city has not interfered with any track already laid in the city, and the

issue tendered is the right of the railroad company to lay the additional track on Division Street west from Michigan Street to General Taylor Street upon which portion of Division Street the railroad company, at the time of the construction of its original line through the city of South Bend in 1871, had only constructed, maintained and operated a single track.

The amended complaint is in two paragraphs, the paragraphs being substantially the same, differing only in the allegations with reference to the manner in which the plaintiff in errror acquired title to the property, privileges, franchises, rights of way and immunities from its predecessors in title. In each paragraph the irrepealable contractual character of Ordinance No. 62, and therefore the invalidity of the repealing ordinance of 1901, is relied upon by plaintiff in error to sustain its rights to lay the additional track on Division Street between Michigan and General Taylor Streets. Neither the Ordinance No. 62 nor the repealing ordinance are set forth in haec verba. As to these ordinances plaintiff avers:

> "That on the 2nd day of March, 1868, the common council of the city of South Bend duly passed and enacted an ordinance numbered 62, whereby it was ordained that the Peninsular Railroad Company of Indiana was and should be authorized to construct and maintain a track for its said railroad within the city of South Bend upon the following terms, to-wit:
>
> Commencing at the eastern limits of said city on the east end of a Twenty foot street laid out and dedicated on the south side of Samuel G. Cottrell's Addition to the town of Lowell, or at any point on said

Twenty foot street that the company might see proper to adopt; "Thence across the St. Joseph River to the eastern end of the extension of Division Street and its extension in said city so far west as the said company may desire, crossing all intermediate streets and alleys, and to run locomotive cars and trains over said road so far as might be necessary for the conducting of the business of said company." That it was further provided in said ordinance that the right of said company to locate their road through the city of South Bend should be subject to the conditions and terms, following, to-wit:

1st. The grant should not be construed to interfere with the private rights of the owners of real estate over which said road might be located, relative to damages for such occupancy and appropriation, but was made subject thereto.

2nd. That when the road crossed any street or alley, it should be made to conform to the grade of such street or alley, unless the common council should consent to a variation of such grade.

3rd. That at the crossing of streets and alleys the company should lay its tracks in such manner as to cause as little obstruction as possible to the use of such streets and alleys for the passage of wagons and other vehicles, and should plank its track between the rails and within at least six feet of each side of said rails at all such crossings the entire width of said street or alley, and should also plank or gravel the side walk where they might cross said railroad, and should also make said crossing safe, and convenient for the passage of persons and vehicles, and should keep said crossing when so made in good repair so long as they should use the streets and alleys for the purpose aforesaid.

4th. That the company should construct and keep in repair under and on the line of said road

at such points as might be deemed necessary by the city engineer, sufficient culverts and drains to admit of the free passage of water along the streets which might be affected by the construction of said railroad.

5th. That in the event of the failure of the railroad to do the said acts and things so required to be done, and in case the said company should fail to put such crossing in the order above required to be done, or to keep the same in repair and to construct and keep in repair such culverts, that then the same should be done by the Street Commisioner of said city under the direction of the common council, and the city should collect the costs of the same by suit at law.

6th. It was further provided in said ordinance that the company should not permit cars or locomotives to stand at street or alley crossings so as to obstruct the free passage of teams, vehicles or persons, without danger or inconvenience, and should, when a train was going out or coming in, ring its engine bell so as to give notice of arrival or departure, nor should it run any locomotives or cars on said railroad at a faster rate than five miles an hour between Chapin and Michigan Streets within the limits of said city, under a penalty of Ten Dollars for each offense.

It was further provided in said ordinance that no more than one track for such road should be laid across any street of said city without the previous assent of the common council of said city except only the privilege which it is stated "Is hereby granted to lay down a double track across the bridge over the St. Joseph River and from the western terminus of said bridge to General Taylor Street in said city, subject to the conditions herein before contained," and subject also to the provisions that said company should and would in-

demnify the city and hold it harmless and free from all damages or costs for the bridging of the said river within the jurisdiction of said city." (Rec. pp. 5 and 6.)

* * * * *

"28. Plaintiff further avers that on the fourteenth day of October, 1901, the said city of South Bend through its common council assumed by said ordinance to repeal so much of said ordinance granting the right to maintain a railroad in said Division Street as gives the right to a second track in said street, and said city now sets up and claims that said action of its common council was effective in that behalf, and that thereby the plaintiff's right to said second track was lawfully revoked. Plaintiff, on the contrary, claims that said ordinance constituted a contract in its entirety as between said city and the railway company in whose behalf it was granted as aforesaid; irrepealable by said city, either in whole or in part, and that plaintiff has succeeded to all the rights of said railroad company under said contract; that said ordinance of repeal is void as violative of said contract and plaintiff's right thereunder, as being in conflict with Section 10 of Article 1 of the Constitution of the United States, and in conflict also with Section 24 of Article first of the Constitution of Indiana. (Rec. 13.)

The allegation of the amended complaint as to the dimension, character, environment and use of Division Street as bearing upon the question of its capacity to accommodate a double track railroad without unreasonable interference with the use of the street for general highway purposes also are material to a clear understanding of the issues. On this point the complaint alleges as follows:

"19. And plaintiff avers that the said Peninsula Railway Company in the year of 1871, relying on the full force of the ordinance of defendant's city, above mentioned, did build its said railroad through St. Joseph County in the State of Indiana, and did build a single track through Division Street in the city of South Bend, and in so doing did lay a single track of rails on Division Street in the city of South Bend from the west end of the bridge crossing the St. Joseph River in said city, and did extend its tracks therefrom to the west side of Laurel Street in said city, and that said tracks was laid in the center of said street, and southwesterly from said Laurel Street to the west side of said county, and that the said Peninsular Railway Company and its successors hereinbefore mentioned, each relying likewise on the full force of said ordinance, have ever since kept up and maintained and operated the same as a railroad, and that this plaintiff is now operating the same as a railroad, and as a part of its continuous lines." (Rec. 10.)

"26. It is furthermore apparent, and plaintiff avers the fact so to be, that the obstructing of the general public in the use of said street by passing trains will be much less when two tracks are used than it now is when all trains, both ways, have to pass over a single track, that said street is 82½ feet wide and that there is ample room thereon for general travel and for said double track." (Rec. 12.)

"27½. Said plaintiff avers that on the first day of January, A. D. 1881, said Chicago and Grand Trunk Railway Company did lay down a double track on Division Street between the St. Joseph River and Michigan Street and it and its said assigns have ever since used and plaintiff still uses the same." (Rec. 13.)

Defendant in error contends that the complaint presents only the question of the right of the railroad company to lay down an additional and second track on Division Street between Michigan Street and General Taylor Street, and that the validity of the repealing ordinance as to the double track already laid on Division Street east of Michigan Street is not an issue in this case. The allegations of the complaint with reference to this phase of the case are:

> "29. And plaintiff avers that on the 6th day of October, 1902, plaintiff deeming it necessary in order to accommodate and successfully and properly carry on its business and operate its railroad, to lay down an additional and so construct and operate a double track railroad from the west end of said bridge through and along the central part of Division Street aforesaid from said bridge west to Taylor Street, aforesaid brought to the City of South Bend its work train loaded with rails and ties necessary for the doing of said work and for the laying down of said additional track, and brought to South Bend on said train a force of between thirty and forty laboring men who were in its employ and with said employes commenced to remove dirt and make such slight excavations as were necessary in order to commence the making of said double track railroad on the land so appropriated, and continued on said work for a short period of time, and that then the said mayor of said city with a number of policemen of said city came to the place where the said employes of plaintiff were at work as aforesaid and forbade the continuance of said work, and threatened to arrest each and every one of said workmen who should do any work, or make any excavation, or, as he expressed it, put a shovel or spade in the earth for the purpose aforesaid, and did thereby so alarm

and terrify said workmen that they were made to desist from said work and plaintiff was unable and still is unable to proceed therewith and the plaintiff avers that the said Board of Public Works of said city did direct, authorize and approve of the said acts of the said mayor and policemen and do declare and assert that plaintiff has no legal right to and shall not lay down said second and additional track on said Division Street west of said bridge, and that in case of any attempt on the part of plaintiff so to do, the performance of said work shall be stopped by force and violence and that the police force of said city shall be used for the purpose of preventing such performance; and plaintiff says that the defendants have stated and proclaimed that they will not under any circumstances allow plaintiff to lay down and complete its said double track, and threaten from time to time to place under arrest each of such persons as may be employed by plaintiff in the laying down and completing said double track, and unless restrained, the defendants will by putting the employes of plaintiff in fear and intimidation prevent the completion of said work, and plaintiff avers that the said wholesale arrest of workmen and employes of plaintiff will necessarily result in numerous and long continued law suits and in vexatious litigations.

Wherefore plaintiff prays that defendants and each and all of them be enjoined from in any way hindering or preventing plaintiff from laying down said second and additional track on Division Street, aforesaid, and from arresting any servants, agents, employes or workmen of and who may be employed by plaintiff in laying down such double track, and that it be found and decreed by said Court that plaintiff by grant from the city of South Bend has a valid and indisputable right to

lay down, hold, use, maintain and occupy a double track railroad on Division Street aforesaid from said bridge west to Taylor Street in said city, and that its title to said right of way be decreed and adjudged to be valid and defendants and each and all of them, and their servants and agents be enjoined from interfering with, from preventing, interfering with or hindering plaintiff in the exercise and enjoyment of such rights and franchises." (Rec. p. 13, 14.)

In 1860 the population of the city of South Bend was 3,832; in 1870, 7,206; in 1900, 35,999, and in 1910, 53684.

PROPOSITIONS.

First: The Supreme Court of the State of Indiana has, in good faith and in consonance with the rules of construction applicable to pleading in its jurisdiction, held, in its opinion in this case

(a) That the theory of the complaint is that the plaintiff in error has the legal right to construct a second and additional track on Division Street between Michigan Street and General Taylor Street, and does not involve a consideration of its double track rights on Division Street east of Michigan Street. This Court will adopt that theory.

(b) That the averments of the complaint with reference to the reasonableness of the ordinance are not well pleaded, hence in that particular the complaint does not state a cause of action. This construction of such averments will be accepted by this Court.

Second: The repealing ordinance is valid and the adoption of it by the common council of the City was a valid exercise of its police power. It does not matter whether you denominate the original ordinance a contract or a license:

(a) It was an exercise by the city of its delegated legislative powers and the city could not by contract

covenant or otherwise barter away its future legislative control over Division Street.

(b) The city had general jurisdiction of Division Street and its first duty was to preserve the street for its primary use—public travel.

(c) The modification of the original ordinance by the adoption of the repealing ordinance was a valid exercise of the police power of the city.

(d) The action of the city council under the allegations of the complaint cannot be impeached.

(e) The reasonableness and good faith of the council's action in repealing part of the original ordinance must be presumed as the complaint states nothing to the contrary.

(f) The judgment of the law-making body—the council—upon the necessity of this repeal is final.

POINTS AND AUTHORITIES.

The validity of Ordinance No. 62 is not questioned. The naked question is: Did the City of South Bend have the power to repeal and set aside the grant of the right to lay down the additional track on Division Street between Michigan Street and Taylor Street? In other words; is Ordinance No. 62 an irrepealable contract?

PLEADING, COMPLAINT—ITS THEORY AND AVERMENTS.

1. The supreme court of Indiana has held that the theory of the complaint is the right of the railroad company to lay the second and additional track on Division Street between Michigan and General Taylor Streets, and that the allegations of the complaint as to the character, environment, use, and dimensions (except the width) of Division Street and its capacity to accommodate the additional and second track, are not well pleaded and insufficient to show that the repealing ordinance is unreasonable. This theory and construction of the complaint will be accepted by this Court as all causes of action originating in the state court and in the inferior federal courts are, and necessarily must be, subject to the rules of pleading obtaining in the particular jurisdiction, and it is for the state court to say whether the particular cause of action has been sufficiently alleged and also the scope and theory of the pleading and the meaning to be given its various allegations as measured

by the rules applicable to the pleading obtaining in the state.

Vandalia R. R. Co. v. State of Indiana ex rel City of South Bend, 207 U. S. 130;

Newport Light Co. v. Newport, 151 U. S. 529, 536;

Iowa Central R. R. Co. v. State of Iowa, 160, U. S. 389;

Union Pacific R. R. Co. v. Pain, 119 U. S. 561;

Chapman v. Crane, Adm., 123 U. S. 540, 8 Sup. Ct. Rep., 211;

Baupre v. Noyes, 138 U. S. 397 (401);

Klinger v. Missouri, 13 Wallace, 257 (263);

Speed, Adm., v. McCarthy, 181 U. S. 269.

II. The supreme court of Indiana finds that no question is presented by the complaint as to plaintiff in error's double track rights on Division Street east of Michigan Street, and that no question was raised as to such rights until the filing of the railway company's brief in support of its petition for rehearing. That question can not now be successfully urged under the rule that if the cause of action is founded upon a federal question it should have been presented at the earliest opportunity not only in the supreme court of the state, but before the trial court.

Chappel v. Bradshaw, 128 U. S., 132.

III. All allegations in the pleading which go beyond the statement of a good cause of action over the theory adopted is mere surplusage, and when the statement of the cause of action upon such theory tested by the rules of pleading do not disclose that a federal ques-

tion is involved, the federal court has no jurisdiction. On this principle, in the case at bar, as an original matter here, no question is presented here as to the double track rights of the railroad company on Division Street east of Michigan Street.

City of Fergus Falls v. Fergus Falls Water Co. 72 Fed. Rep. 873.

IV. It is manifest that the construction placed upon the pleading and its averment by the supreme court of Indiana was in consonance with the rules of construction applicable to pleadings in that jurisdiction. It is the rule in that jurisdiction:

First, that a pleading must be judged from its general tenor and scope, and when it assumes to proceed upon a distinct theory it can not be made good upon some other by casting into it isolated statements which, if fully pleaded in separate paragraphs, might constitute a cause of action.

Western Union Telegraph Co. v. Young, 93 Ind., 118;

Western Union Telegraph Co. v. Reed, 96 Ind. 198;

Balue v. Taylor, et al, 136 Ind. 368.

Second: That facts in pleadings must be positively averred and not set out by way of recital, inference or conclusion, and that no facts will be presumed to exist in favor of a pleading which have not been averred or alleged.

Wabash R. R. Co. v. Beedle, 173 Ind., 437, 90 N. E., 760, 763.

Wabash R. R. Co. v. Hasset, 170 Ind., 370, 83 N. E. 705.

Chicago & Erie R. R. Co. v. Lain, 170 Ind., 84, 90.

V. Call the grant a license or a contract, as you will, it is subject to the police power of the municipality. That the plaintiff in error ever acted on or expended money on the strength of the privilege given to lay a double track is the conclusion of the pleader who drew the complaint. The complaint does not show that plaintiff in error attempted to lay a double track between Michigan and General Taylor Streets before the adoption of the repealing ordinance of 1901.

VI. A demurrer only admits facts well pleaded. It does not admit that Division Street is of ample width to accommodate both railroad trains and the public in passing along the same. It does not admit that two tracks are less obstruction and less dangerous than one. It is not for the pleader to say whether Division Street is wide enough to accommodate railway trains running longitudinally on two tracks. His conclusions do not determine public necessities. This was a legislative question for the Common Council to decide. An ordinance enacted in the exercise of police power is presumed to be reasonable and valid until the contrary is made to appear. The presumption is in favor of the reasonableness of the power exercised. Especially strong should this presumption be when the repealing act concerns protection of life. The complaint of plaintiff in error should state facts to show that the City Council acted wantonly or maliciously or through bribery or without legislative authority; otherwise the presumption is in favor of the legality of the council's action.

Cleveland, etc., Ry. Co. v. Harrington, 131 Ind., 426 at 436.

Jamieson v. The Indiana Natural Gas & Oil Co., 128 Ind., 555.

City of Peru v. Gleason, 91 Ind., 567.

Fry v. State, 63 Ind., 552 at 560.

Columbus Gaslight & Coke Co. v. Columbus, 33 N. E. 292.
(Especially first paragraph of opinion.)

Wabash Ry. Co. v. City of Defiance, 17 S. C. R., 745 at 753.

Snouffer v. Cedar Rapids City and M. City Ry. Co. 92 N. W. 79;

Parson v. Sweet, 13 N. J. Law, 196;

State v. Inhabitants of the city of Trenton, 53 N. J. Law, 132; 20 Atl. 1076; 11 L. R. A., 410.

SUBSTANTIVE LAW.

VII. As stated by plaintiff in error in its brief, page 18, "The supreme court of Indiana holds with uniformity that under the Indiana Statute cities have general jurisdiction over streets, and that under this general power the right to occupy streets by railroad tracks may be granted." But the mere fact that plaintiff in error enjoys contract rights in the street is not controlling; it must always be understood that those who enter into such contract relations with the city as render their property reasonably subject to control do so with the knowledge that the police power is an inalienable and continuing authority in the city.

Indiana Ry. Co. v. Calvert, 168 Ind. 321;

Baltimore v. Baltimore, etc., Guaranty Co., 166 U. S. 673;

Vandalia R. R. C. v. State ex rel, 166 Ind. 219.

VIII. The supreme court of the state of Indiana in its opinion in this case holds that the denial of the right of plaintiff in error to construct an additional track on Division Street between Michigan and General Taylor Streets under the facts disclosed in the complaint and under the repealing ordinance is a reasonable regulation under the statutes of the state of Indiana. (Rec. 48, 60.) When a state court has construed a statute this Court will accept that construction, and the power of determining the meaning of a statute carries with it the power to describe its extent and limitation as well as a method by which they shall be determined.

Smiley v. Kansas, 196 U. S. 447-455.

Martin v. West, 222 U. S., 196.

Chicago v. Sturges, 224 U. S., 321;

Lindsley v. Natural Carbonic Gas Co., 220 U. S., 73:

Boston Chamber of Commerce v. Boston, 217 U. S., 194;

Gatewood v. N. C., 208 U. S., 541.

IX. The repealing ordinance of October, 1901, was a proper exercise of the police power; the power of legislating for the protection of the public in the streets of the city is held by the city council in trust, and cannot be the subject of an irrevocable contract; a city council can not limit its legislative discretion in the future by contract or grant so as to deprive itself of its police power; the power of regulation and control of streets is a continuing power to be exercised at all times for public benefit.

Vandalia R. R. Co. v. the state ex rel city of South Bend, 166 Ind., 219, 76 N. E., 980.

Indiana Ry. Co. v. Calvert, 168 Ind., 321;

Laurel Hill Cemetery v. City of San Francisco, 216 U. S. 358, 365.

City of Peru v. Gleason, 91 Ind., 567.

Lake Roland Elevated Ry. Co. v. Baltimore, 26 Atl., 510.

Mayor of Baltimore v. Baltimore Trust & Guarantee Co., 166 U. S., 673; 17 S. C. R., 696;

Wabash Ry. Co. v. City of Defiance, 167 U. S., 88; 17 S. C. R. 748.

C. B. & Q. Ry. Co. v. State of Nebraska, 170 U. S., 57; 18 S. C. R., 513.

New York & N. E. Ry. Co. v. Town of Bristol, 151 U. S., 556; 14 S. C. R., 437.

Board of Education v. Phillips, 73 Pac., 97.

Snouffer v. Cedar Rapids Ry., 92 N. W., 79.

Town of Clarendon v. Rutland Ry Co., 52 Atl., 1057.

Thorpe v. Railway, 27 Vt., 141.

Binninger v. City of New York, 69 N. E., 390.

Presbyterian Church v. City of New York, 5 of Cowen, 542.

X. The police power is but another name for the power of government and legislation and can not be judged by theoretical standards but must be tested by the concrete conditions which induced it, and this court will not oppose to legislation under the police power its notions of its necessity for such legislation in determining whether the legislation is arbitrary and unreasonable and not designed to accomplish a legitimate public purpose.

Mutual Loan Co. v. Martell, 222 U. S. 232-234;

Laurel Hill Cemetery Co. v. San Francisco, 216 U. S. 358-365.

XI. It is not important whether we call such an ordinance a license or a contract. The real question is: is it repealable? Where privileges are given to a private corporation and subsequent regulation attempted is purely a matter of private concern, the facts come within the Dartmouth College doctrine, but this doctrine does not apply to the public contracts or charter legislation of municipalities, which are more in the nature of licenses and not irrepealable contracts. Ordinance No. 62 is not in the class of contracts which a municipality makes as a property holder, but was an exercise by the city of its delegated legislative powers.

Vandalia R. R. Co. v. the State ex rel City of South Bend, 166 Ind. 219, 76 N. E., 980.

Indiana Ry. Co. v. Calvert, 168 Ind., 321;

Indianapolis, etc., R. R. Co. v. the State, ex rel, 37 Ind., 489.

Meyer v. Town of Boonville, 162 Ind., 165, bottom of 167.

Wabash Ry. Co. v. Defiance, 17 S. C. R., 748.

Binninger v. City of New York, 69 N. E., 390.

Lake Roland Elevated v. Baltimore, 26 Atl., 510.

Snouffer v. Cedar Rapids Ry., 92 N. W., 79, at 83.

Logansport Ry. Co. v. Logansport, 114 Fed., 688.

Citizens Ry. Co. v. City Co., 64 Fed., 647.

Citizens Co. v. City Co., 56 Fed., 746.

XII. Neither the condition of the title of the plaintiff in error nor its relations with abutting property owners is imp[illegible]. If the repealing ordinance of 1901 is a valid exercise of the police power, it matters not whether plaintiff in error is deprived of the benefit of an easement, a privilege, a contract, or a license.

Black's Constitutional Law, pp. 290, 293, 298.

Town of Clarendon v. Rutland Ry. Co., 52 Atl., 1057.

XIII. The railroad company's complaint shows on its face that the privilege of laying a double track on Division Street between Michigan and General Taylor Streets was never exercised. We do not question the validity of Ordinance No. 62 nor the regularity of the railway company's articles of incorporation. The repealing ordinance of 1901, if void, is void only on the ground that it is not a proper exercise of the police power.

XIV. The repealing ordinance of 1901 is not based upon non-user. Power is sometimes reserved to alter, amend or repeal grants, but the police power also necessarily extends to grants which do not contain any express reservation.

XV. It was the repealing ordinance of 1901 that extinguished the right to lay down the second track on Division Street between Michigan and General Taylor Streets. The original grant was prospective and was made in view of the growth of the city and increase of business, and must be interpreted in view of future public needs.

Gale v. Village of Kalamazoo, 23 Mich., 343.

XVI. The repealing ordinance of 1901 concerns not only the use of the street for convenience of public travel, but also the protection of human life. Subjects of much less importance have properly been held to be within the scope of the police power.

International Text Book Co. v. Weissinger, 160 Ind., 349.

Fry v. State, 63 Ind., 552.

Adams Express Co. v. State, 161 Ind., 328.

Given v. State, 160 Ind., 552.

Stone v. Mississippi, 11 Otto, 814.

State v. Woodward, 89 Ind., 110.

Barber v. Connolly, 113 U. S., 27; 5 S. C. R., 357.

Columbus Gaslight Co., v. Columbus, 33 N. E., 292.

Slaughter House cases, 16 Wallace, 36.

XVII. The rule is that an estoppel may be raised against a private corporation even when it has not the power to act, but no estoppel can be raised against a public corporation.

State ex rel City of St. Paul v. Minnesota Transfer Ry. Co., 80 Minn., 108, 83 N. W., 32.

Rissing, et al, v. City of Fort Wayne, 137 Ind., 427.

XVIII. Neither the question of estoppel nor the question of laches, when raised in the state court, present or involve a federal question.

Speed v. McCarthy, 181 U. S., 269, 275.

Moran v. Horsky, 178 U. S., 205.

XIX. This Court will take judicial notice that every additional track place longitudinally along the streets and crossing intersecting streets increases the danger of the public and inconvenience to travel.

1 Elliott on Evidence, Sec. 39, 42 and 62.

XX. The Court will also take judicial notice of the population of the City of South Bend as shown by the United States census since its incorporation:

CENSUS	POPULATION
1910	53,684
1900	35,999
1890	21,819
1880	13,280
1870	7,206
1860	3,832
1850	1,652

MAPS OF THE CITY OF SOUTH BEND AND DIVISION STREET.

For the convenience of the Court, and with its leave, we here insert two maps: One a map of the city of South Bend, and the other a map of Division Street. The red line on the face of the first indicates that part of Division Street upon which the city denies the railway company's right to lay the new track. The second map shows the location of the tracks on Division Street at the time this controversy arose. The dotted line thereon shows the location of the proposed second track.

ARGUMENT.

I

PLEADINGS, COMPLAINT — ITS THEORY AND AVERMENTS.

An orderly presentation of the argument in behalf of defendant in error requires us to discuss first the proposition last discussed by plaintiff in error in its brief. This proposition relates to the complaint and the force and effect of its averments. Counsel says that the facts averred in the complaint and admitted by the demurrer have the following effect:

(a) They conclusively overcome any presumption that might otherwise arise in support of the reasonableness or the validity of the repealing ordinance or justification for its passage.

(b) They are material facts and not conclusions of the pleader as held by the Indiana court. They show clearly the capacity of Division Street for public travel and double tracks.

(c) They further show that there was no necessity for the repealing ordinance; that it was unreasonable and operated to impair the obligations of the contract part of Ordinance No. 62. (Brief p. 75.)

Each of these points was urged upon the supreme court of Indiana, and was decided adversely to plaintiff in error. Before entering upon any discussion of

these three propositions it is essential to clearly determine the exact issue now presented to this Court. We contend that the only issue before this Court is the sufficiency of the complaint as to the double track rights of plaintiff in error on Division Street between Michigan and General Taylor Streets, and that no question as to the double track rights of the railroad company on Division Street east of Michigan Street is before this Court. Counsel for plaintiff in error contends that the matter of double track rights of the railroad company on Division Street east of Michigan Street is an issue here. However, we would direct the court's attention to the fact that the supreme court of the State of Indiana has found in its opinions that the theory of the complaint only involved the question of the double track rights of the company on Division Street between Michigan and General Taylor Streets, where a single track only has been constructed and maintained, and that the complaint presented no question as to the double track rights of the railroad company on Division Street east of Michigan Street where a double track had been laid before the commencement of this action. (Rec. 57.) As it appears from an examination of the record and the opinions of the supreme court of Indiana that this construction of the complaint was made in good faith and in consonance with the rules of construction applicable to pleadings in the State of Indiana, this Court will adopt that construction and theory. Vandalia R. R. Co. vs. State ex rel City of South Bend, 207 U. S., 130, and authorities cited under point I. (ante p. 14.)

We submit that the general tenor and scope of the allegations in the complaint show conclusively that it was the purpose of the railroad company by this action

to determine its double track rights in Division Street between Michigan Street and General Taylor Street only, and that the allegations with reference to the company's position and the number of its tracks on Division Street east of Michigan Street are isolated statements incidental to the presentment to the courts of its alleged rights on Division Street between Michigan and General Taylor Street, and therefore do not change or affect the theory of the complaint as above stated.

That the supreme court of Indiana construed the complaint in consonance with the practice and the rules of construction applicable to pleadings in that state is shown by the following excerpt:

> "Appeals are provided primarily to enable parties to secure a review of the decisions made by trial courts and generally speaking, upon appeals, parties will be held to the position and theory assumed and maintained by them in the court below. In the preparation of issues for trial, it is necessary to require parties to adopt and make their pleadings conform to some definite theory. When a pleading has been framed upon a manifestly definite theory, it must be good upon that theory, or it will not be good at all. A pleading must be judged from its general tenor and scope, and, when it assumes to proceed upon a distinct theory, it cannot be made good upon some other by casting into it isolated statements, which if fully pleaded in separate paragraphs might constitute a cause of action or defense."
>
> Vandalia R. R. Co. v. State ex rel, 166 Ind. 219, 229 and cases cited.

The opinion of the supreme court of Indiana states that the question with reference to double track rights

on Division Street east of Michigan Street was first urged upon that court by the railroad company in its brief in support of its petition for rehearing (Rec. 57). As it was the duty of the plaintiff to properly and sufficiently allege facts in its complaint to raise this question and actually present it to the courts below at the first opportunity, the railroad company is not now in position to urge that question upon this court, for, as the supreme court of Indiana in Mescall v. Tulley et al, 91 Ind 96, says, "a pleading cannot be made elastic so as to take form with the varying view of counsel."

However, as an original question here, it is manifest that the supreme court of Indiana was clearly right in adopting the theory of the complaint stated. For the convenience of this court we have set forth in this brief (ante p. 8) those paragraphs of the complaint which, in our opinion, are determinative of the theory of the pleading.

According to the allegations of the complaint on the first day of January, 1881, plaintiff's predecessor in title "did lay down a double track on Division Street between the St. Joseph River and Michigan Street and it and its assigns have ever since used and plaintiff still uses the same." (Rec. 13.) And that, plaintiff, deeming it necessary, etc., "to lay down an additional track and so to construct and operate a double track from the west end of said bridge through and along the central part of Division Street aforesaid from the said bridge west to Taylor Street, brought to the City of South Bend its work train loaded with rails and ties necessary for the doing of such work and the laying down of such additional tracks and commenced to remove dirt and make such slight excavations as were necessary in

order to commence the making of said double track railroad," and thereupon the city interfered with the proposed work; that the city, through its mayor, policemen and board of works "do declare and assert that the plaintiff had no legal right to and shall not lay down said second and additional track on Division Street west of said bridge," and "will not, under any circumstances, allow plaintiff to lay down and complete its said double track," and will arrest and threatened to arrest "each of such persons as may be employed by plaintiff in laying down and completing such double track." There is no allegation in the complaint that the city or any agent thereof had interfered or threatened to interfere with the use and operation of the double track already laid on Division Street east of Michigan Street. Giving the proper force and effect to all of the allegations of the complaint and determining its theory from its leading allegations, it conclusively appears that the theory of this action was to prevent the city from interfering with the laying down of additional tracks between Michigan Street and General Taylor Street only. In answer to the contention of the railroad company on this point in its brief supporting its petition for rehearing the supreme court of Indiana, after reconsideration of the allegations of the complaint, say, in its opinion, "We were clearly correct in our theory that only the question of laying the additional track was involved" (Rec. 58), and under the practice of this court this theory will be accepted as the true theory of the complaint.

We now pass to a discussion of the allegations of the complaint and the force of same as bearing upon the question of the reasonableness or unreasonableness of Ordinance No. 62, maintaining, of course, that those

allegations are directed only to the reasonableness or unreasonableness of the repealing ordinance as affecting the double-track rights of the railroad company on Division Street between Michigan Street and General Taylor Street. Plaintiff in error maintains that it is affirmatively shown by the averments of the complaint "that ordinance contract 62 was not only authorized by statute, but that it was reasonable and that public interest and public travel were fully and adequately protected, and that the repealing ordinance was not only unreasonable but wholly unnecessary" (Brief 75), and "that the court of Indiana misapprehended the force of the statements and averments of facts recited in the complaint" with reference thereto. The supreme court of Indiana in its opinion in this case finds that the facts pleaded with reference to the question of the reasonableness of the repealing ordinance are not well pleaded except possibly the fact as to the width of Division Street and also that even on the assumption of those facts being well pleaded they do not show that the repealing ordinance is an unreasonable regulation or overcome the presumption of the action of the common council being reasonable and based upon sufficient grounds and within the discretion of the city authorities (Rec. 60). This court will not only accept the theory of the complaint adopted by the supreme court of the State of Indiana, but the meaning, character and force of the various allegations of the complaint. Vandalia R. R. Co. v. State ex rel City of South Bend, supra, and cases cited under point I. But as an original question here we submit that the complaint does not show that the repealing ordinance is an unreasonable exercise of the police power. The averments of the complaint directed to this phase of the case are as follows:

"19. And plaintiff avers that the said Peninsular Railway company in the year 1871, relying on the full force of the ordinance of defendant's city, above mentioned, did build its said railroad through St. Joseph County in the State of Indiana, and did build a single track through Division Street in the City of South Bend, and in so doing did lay a single track of rails on Division Street in the City of South Bend from the west end of the bridge crossing the St. Joseph River in said city, and did extend its tracks therefrom to the west side of Laurel Street in said city, and that said tracks was laid in the center of said street, and southwesterly from said Laurel Street to the west side of said county, and that the said Peninsular Railway Company and its successors hereinbefore mentioned, each relying likewise on the full force of said ordinance, have ever since kept up and maintained and operated the same as a railroad, and that this plaintiff is now operating the same as a railroad and as part of its continuous lines." (Rec. 10.)

"26. It is furthermore apparent, and plaintiff avers the fact so to be, that the obstructing of the general public in the use of said street by passing trains will be much less when two tracks are used than it now is when all trains, both ways, have to pass over a single track, that said street is 82½ feet wide and that there is ample room thereon for general travel and for said double track." (Rec. 12.)

"27½. Said plaintiff avers that on the first day of January, A. D. 1881, said Chicago and Grand Trunk Railway Company did lay down a double track on Division Street between the St. Joseph River and Michigan Street and it and its said assigns have ever since used and plaintiff still uses the same." (Rec. 13.)

There is no allegation in the complaint as to the improvements on Division Street, the location or width of sidewalks, the presence of curbs, the amount or degree of traffic longitudinally upon the street, the character and extent of travel over it and intersecting streets, its relation to other thoroughfares as an artery of travel, the topography of the land upon which the street is located and the land immediately adjoining, and other details as to the character of the street and its environs which would put this court in full possession of the facts upon which to base a finding as to the reasonableness of the repealing ordinance as a police regulation. In the absence of such a showing by the complaint, the presumption is that the character of the street and its environs and the amount of travel thereon and the width thereof were such as to warrant the city in exercising its police power in the passage of the repealing ordinance, and that the repealing ordinance is a valid exercise of that power. It is patent that the supreme court of Indiana was clearly right when it said that the allegations in paragraph 26 of the complaint to the effect that there would be less obstruction of the street by the use of two tracks than one, and that the street is eighty-two and one-half feet wide and there is ample room thereon for general travel and for a double track, was the allegation of a conclusion, except, perhaps, as to the allegation as to the width of the street; and even as to the width of the street the courts hold that the width stated includes the sidewalks. (Rec. 53.)

And as to the allegation with reference to the space occupied by two tracks as compared with one track and the relative safety in operating same, the Indiana court

well says, "We can not know how much space is required for the operation of one track, but we do know that it required double, or, for safety between the tracks, more than double space for two tracks. The allegation, therefore, that the obstruction will be less with two tracks than one track is not only a solecism, but the allegation, if not a conclusion, is the allegation of a thing which necessarily could not be, and hence without force and cannot be regarded." (Rec. 54.) Citing Indiana, etc., Co. v. Jamieson, 128 Ind. 555; Jones v. United States, 137 U. S. 202.

Counsel for plaintiff in error in his brief at page 77 argues that the averment "that on the first day of January, 1881, the Chicago & Grand Trunk R. R. Co. did lay down a double track on Division Street between the St. Joseph River and Michigan Street and it and its assigns have ever since used and plaintiff still uses the same," together with the fact that it is alleged that the fee in eighteen feet in the center of the street was acquired as against abutting property owners for railroad purposes, clearly shows that sixty-four and one-half feet will be left for public use after construction of the double track. It is to be noted that the allegations in the complaint about the construction of the double track heretofore laid refers to that part of Division Street east of Michigan Street and has no reference to that portion west of Michigan Street and here in controversy. It is also to be noted that there is no allegation that the double track laid east of Michigan Street was actually laid on an eighteen-foot strip. The allegations in the complaint, therefore, leave plaintiff in error under the necessity of arguing as an inference that because the railroad company laid a double track on Di-

vision Street in 1881 upon a portion of the street, the width of which is not alleged, and because they had acquired, in 1881, as against abutting property owners the fee in the soil of a strip eighteen feet wide for the purpose of constructing a double track at some future time, that therefore the double track now to be laid on the portion of the street in controversy will not occupy more than eighteen feet. We maintain these allegations form no substantial basis upon which the court could find that the double track to be laid would occupy but eighteen feet, particularly when, as the supreme court of Indiana says in its opinion on the petition for rehearing (Rec. 57), "it is quite well known that safe clearance of two trains upon double track requires from twenty to twenty-two feet, to say nothing of the danger from teams or vehicles moving longitudinally in close proximity to moving trains. Lord Denman, C. J. in Baynes v. Brewster, 1 G. &. D. 674, Chitty on Pleading Note G, p. 206, lays down the rule that "the general propositions necessary to the case of a party should be stated in plain terms and not left to inference from particular circumstances," and Stephen in his work on Pleading, in discussing the manner in which a cause of action should be stated, says, as to the duty of pleaders (p. 384): "In other words, they must advance their positions of fact in an absolute form and not leave them to be collected by an inference and argument only." The allegations of the complaint now under consideration with reference to the reasonableness of the repealing ordinance are clearly violative of the rules of pleading, are argumentative and the statement merely of the conclusion of the pleader, and therefore are not to be considered as facts in th disposition of this cause.

Counsel for the railroad company in his brief on pages 76 and 77 lays particular stress upon the point made that it is a fact and not an opinion of the pleader that the obstruction will be less with two tracks on Division Street than with a single track. This Court will take judicial notice of the fact that two tracks laid longitudinally upon a street will be more of an obstruction to the street than one track. Elliott on Evidence Sec. 39, 42. The supreme court of Indiana answered this contention of the railroad company in the court below in these words:

> "Suppose there are two tracks and both are necessary to accommodate the present volume of traffic, then we might have the case of the street being occupied practically all the time by opposite moving trains, increasing both the occupancy of the street longitudinally and the crossings, and it is well known that safe clearance of two trains upon a double track requires from 20 to 22 feet, to say nothing of the danger from teams or vehicles moving longitudinally in close proximity to moving trains; granting that it is possible that two tracks may be laid within eighteen feet, so that trains will pass over them, still leaves the projection of cars on each side of at least eighteen inches, or three additional feet, which is more of an obstruction in a moving train than the two tracks would be in the width occupied by them, because of the danger of travel, from projecting, or falling matter, control of teams, and the like, and looking to the question of practicability as appellant insists, we can not say as a matter of law that two tracks would not be an obstruction of the primary use to which the street was dedicated but is a legislative question. Wabash Ry. Co. v. Defiance, 167 U. S. 88; Baltimore v. Baltimore Co.

166 U. S. 673; Chicago, etc., Co. v. Whiting, (1894) 139 Ind. 296.

We still think that notwithstanding the allegation of the complaint that there will be less obstruction with two tracks than with one, necessarily can not be regarded as an allegation of a fact."

Concluding this branch of the argument the position of defendant in error is this: That the theory of the complaint is the right to lay the additional track on Division Street between Michigan Street and General Taylor Street; that that was the theory of the complaint adopted by the supreme court of the state of Indiana and will be accepted by this Court; and that the allegations of the complaint purporting to establish the unreasonableness of the ordinance as applied to that part of Division Street between Michigan Street and General Taylor Street are not well pleaded and therefore are not before this court as admitted facts for the purpose of the demurrer.

II.

Substantive Law.

1. The case of Vandalia Ry. Co. v. State, ex rel City of South Bend, 166 Ind. 219, 76 N. E. 980, recognizes the principle of the case at issue. In that case the railway company's right of way crossed a street in the southern part of the city of South Bend known originally as Elmira Street and later as Calvert Street. The railway company maintained a number of tracks at this street intersection and opposed a grade crossing at this point. A dispute was pending between the rail-

way company and the city as to the city's right to require Calvert Street to be opened up across the tracks. The railway company and the city through its board of public works, in settlement of this controversy, entered into a written contract whereby the railway company agreed to construct a steel viaduct over its tracks at Calvert Street and the city agreed to construct the approaches thereof. This viaduct and the approaches were to be in lieu of a grade crossing at Calvert Street, and the city agreed to maintain and keep in repair the approaches and viaduct at all times after the same were completed. This agreement was ratified and approved by the common council of the city by ordinance. It was nevertheless held invalid as an unwarranted surrender by the city of its legislative power and control over the street crossing, and the railway company was compelled to submit to the opening of Calvert Street across its right of way. The court says: "In granting a franchise to use its streets, alleys, or public places, the city exercised its delegated legislative powers, and for that purpose could not by contract barter away its future legislative control over such highways and places. It is the plain and continuing duty of the city to prevent the unnecessary obstruction of its streets and to see that the same are kept in good order and safe for use by the public."

This is the principle upon which we rely. It is as applicable to one set of facts as to another where the acts of a law-making body are appealed to by individuals or corporations as conferring on them special privileges.

The extent to which the courts for the protection of the public have carried this doctrine is well illus-

trated in State v. Minnesota Transfer R. R. Co., 80 Minn. 108, s. c. 83 N. W., 32. A controversy existed between the City of St. Paul and the railroad company with reference to a street intersection, and in settlement the parties entered into a contract for the construction of a viaduct over the crossing. The viaduct was built at an expense of about ninety-eight thousand dollars to the railroad company and twenty-five thousand dollars to the city. The railroad company participated "in the construction thereof, relying upon the good faith of said city and of its officers and common council and upon the aforesaid acceptance of said proposition and report as a valid and permanently binding agreement of said city to maintain and repair the bridge for all future time and at its own sole expense." Notwithstanding these facts the supreme court of Minnesota held that the power of the city to make contracts with reference to streets did not imply authority to cede away the city's discretionary legislative control over the street; that persons contracting with municipal corporations must, at their peril, take notice of the limitation of their contractual power; that estoppel could not be involved by the railway company although the contract embodied a good faith compromise and was substantially executed, and, finally, that the contract relied on by the railroad company was ultra vires and void.

In Indiana the Vandalia case was followed by the Indiana Ry. Co. v. Calvert, 168 Ind. 321, decided in 1906, and is the latest statement of the law by the Indiana courts on the issue in the case at bar. This case directly involved the validity and the constitutionality of a house moving ordinance, which, among other

things, cast the burden of the expense of raising, slacking and replacing the overhead wires of the railway company incident to moving buildings over railway tracks on the company. The court held the passage of the ordinance was a purely legislative act and not subject to judicial control, and that the city had exclusive control of its streets and had the right to regulate the railway company's use thereof, though it had granted a franchise to such company to use the streets; that the passage of the ordinance was a valid exercise of the police power and that it took its franchise subject to the continuing right of the public to exercise fully the police power, and that the expense cast upon it by the ordinance incident to house moving was a valid police regulation, and not the taking of property by eminent domain, though expense resulted.

In the City of Peru v. Gleason, 91 Ind., 566, the facts showed that adjoining the northern corporate limits of the City of Peru was a tract of swampy land, for the drainage of which the city and one Gleason entered into a contract. The city agreed to make a ditch on Benton Street within its limits to serve as an outlet, and Gleason and other proprietors were to continue the ditch through their tracts. Gleason and the other proprietors performed their agreement, but the city failed to construct its part of the ditch. Gleason brought suit for breach of contract and the court held that the city was not liable as it might have been a public benefit for the city to abandon the outlet on Benton Street, but if the contract were valid, circumstances might arise wherein the city could not abandon the drain within its limits even though the drain should turn out injurious to public health, and that the right of judgment given

to the common council of the city must be constantly exercised for the city's welfare, and can not be bargained away.

The Lake Roland cases cited above (ante p. 19) are founded upon this same principle. These cases arose on a state of facts substantially as follows:

In November, 1890, the Lake Roland Railway Company was authorized to construct a double track on Lexington Street in the City of Baltimore, Maryland, and was proceeding to construct the double track when, in November, 1892, so much of the ordinance as authorized a double track was repealed as to about eleven hundred feet on that street, and the city authorities resisted the effort of the railway company to lay the second track on Lexington Street.

The first litigation was the case of Lake Roland, etc., Ry. Co. v. the City of Baltimore, decided March 16, 1893, in the Maryland Court of Appeals, 26 Atl. Rep., 510. It was held that the ordinance was not an irrepealable contract, but might be repealed by the council when in its judgment the public safety and convenience required it. Upon rehearing, Alvey, C. J., says: "The power vested in them in respect to the streets is of legislative character, and they can neither restrict themselves nor their successors by any irrepealable ordinance, in the exercise of such power over the streets, except it be by the express authority of the legislature of the state. The power is a continuing one, to be exercised whenever the public needs may require it; hence the power to regrade and improve the streets from time to time must remain subject to the judgment and discretion of the legislative branch of the municipal government. But if the contention of the appellant

could be maintained, the streets on which railway tracks are once laid might, and most generally would, pass out of the control of municipal authority."

The litigation was continued in the Federal Courts in the name of Baltimore Trust Co. v. City of Baltimore, decided November 13, 1894, in the United States Circuit Court, 64 Federal Rep., 153. This action was brought by holders of mortgage bonds of the Lake Roland Company, and it was held that the first ordinance was an irrepealable contract under Section 10, Article 1, of the Constitution of the United States, and that the repealing ordinance was invalid. On appeal from the Circuit Court to the Supreme Court of the United States (see 166 U. S., 673; 17 S. C. R., 696; April 22, 1897), the decision of the Circuit Court was reversed and the doctrine of the Maryland Court of Appeals sustained. See also p. 77 of this brief for quotation from Justice Peckham's opinion.

In Wabash Ry. Co. v. City of Defiance, 167 U. S., 88; 17 S. C. R., 748, the facts showed that where the Wabash Railway Company passed through the village of Defiance two wooden bridges above the track of the railway were used at the crossings of two streets in the village. These bridges had been built under a grant in the year 1887, to the railway company by the City Council of Defiance. In 1893 the council changed the grades of the streets where the bridges were located to correspond to the grade of the railway tracks, so that the streets approached the tracks on a downward decline on both sides, thus doing away with the overhead bridges. The contention of the company was that the ordinance of 1887 constituted a contract between the railway company and the city for the perpetual main-

tenance of said bridges, and that the subsequent ordinance of 1893 impaired its obligation. It is held that whatever construction be given to the ordinance of 1887 it cannot stand in the way of the city's power to make such changes in its streets as the growth of population may seem to require, and that the Common Council of the city is the sole judge of the public necessities.

In Chicago, B. & Q. Ry. Co. v. State of Nebraska, 170 U. S., 57; 18 Sup. Ct. R. 513, the facts were very similar to the case of Vandalia Ry. Co. v. State ex rel City of South Bend, and concerned a contract entered into between the City of Omaha and the railway company for sharing the expense of maintaining and repairing a viaduct which carried a street over the railroad tracks. It is held that whatever the terms of the contract may be it is within the power of the legislature to alter it to suit public necessities; that the parties to such contracts cannot withdraw the subject matter from the reach of the police power, and cannot be permitted to substitute their views of public necessities for those of the legislature.

In New York, etc., Ry. Co. v. Town of Bristol, 151 U. S., 556; 14 S. C. R., 437, it appeared that the existing grades of railway crossings had been legally established and acted upon by the railway company in the construction of the track and the running of its trains, but that nevertheless if, in the opinion of the legislature, crossings formerly safe had become no longer so, it was within the police power of the state to enact laws for the extinction of grade crossings, and to impose upon the railway company the entire expense of changes of grades at such crossings.

In Town of Clarendon v. Rutland Ry. Co., 52 Atl.,

1057, it is held to be within the police power of the state to require railroad companies to maintain and repair crossings over their roads, even though it is an additional obligation not imposed by the company's charter.

In Thorpe v. Railway, 27 Vt., 141, the same doctrine is applied to an act of the Vermont legislature, requiring railroads to provide cattle guards at highway crossings.

In Binninger v. the City of New York, 69 N. E., 390, a street railway company sought to avoid liability for injuries sustained by a traveler by claiming that its paving obligations were fixed by the franchise contract under which it operated. Held: That the charter was not a contract between the railroad and the city, but legislation, which might at any time be amended in view of the changed conditions and interests of the public.

In Board of Education v. Phillips, 73 Pac., 97, the Leavenworth Board of Education in 1879 refunded its indebtedness and issued a block of bonds. Plaintiff owned one of these bonds and sought to enjoin the board from issuing more for a high school, claiming that a clause in the refunding bond statute, that no bonds should be issued after the refunding bonds, was a contract and should not be impaired. Held: A statute of 1891 authorized this second bond issue. Admitting that there is a contract and that it has been impaired, nevertheless the power to legislate for the interest of the public school system must not be restrained by contract. To be sure, the board of education is a public corporation, but although railroad companies are private corporations as distinguished from those created for municipal governmental purposes, their uses and duties are public. They are invested with the right of

eminent domain and they must be subject to legislative control in all respects necessary to protect the public against danger.

In Snouffer v. Cedar Rapids Ry., 92 N. W., 79, (Iowa), the Cedar Rapids Council in 1895 passed an ordinance requiring the railway to move its track from the side to the center of the street. The council repealed this ordinance in 1901. During this six-year period the railway had made no attempt to exercise any rights under the ordinance. "Any authority to use the streets granted to defendant must be construed as being subject to the police power of the city over the streets, whatever may be the language of the grant. For example, if, by reason of increased traffic on the streets prescribed for the construction of the loop, or for any other reason, the use of those streets by the public are a menace to the safety of the public, it would, in our opinion, be unquestionably within the police power of the city to enact an ordinance requiring the loop to be changed to some other location."

In Presbyterian Church v. City of New York, 5 Cow. 542, the corporation of the city had conveyed lands for the purposes of a church and cemetery, with a covenant for quiet enjoyment, and afterwards, pursuant to a power granted by the legislature, passed a by-law prohibiting the use of these lands as a cemetery. It was held that a corporation could not by contract abridge its legislative power, and that this was not a breach of the covenant which entitled the party to damages, but was a repeal of the covenant.

II. Is it important, then, whether we call the original ordinance of 1868 a license or a contract? If it is, we beg to call attention to the Vandalia case. In speaking

of the franchise ordinance of the railway company, the court say that the city in granting the franchise exercised its delegated legislative powers, and quoting from the case of Indianapolis, etc., Ry. Co. v. the City of Lawrenceburg, 37 Ind., 489 at 495, the court says that *"this ordinance is not a contract between the railway company and the city, but simply a grant of the right-of-way upon certain conditions and duties subsequent to be performed by the company.* (P. 495.) This is exactly the nature of the ordinance of 1868.

In Meyer et al v. Town of Boonville, 162 Ind., 165, the main issues were not the same as in the present controversy, but at the bottom of page 167, the court makes the following valuable distinction:

> "The granting by the board of trustees of a town or the common council of a city of a franchise to use the streets, alleys and public places therein to erect poles and posts and to suspend wires thereon to furnish electric light to such town or city and its inhabitants, or to lay "pipes, mains and conduits" to furnish gas, water, light or heat to such town or city and the inhabitants thereof, is the exercise of a legislative power. But when the town or city enters into a contract with a second party, having such franchise, to light its streets and public grounds and buildings, or to heat its public buildings and offices by steam, hot water or otherwise, or to furnish gas for that purpose, it exercises a business and not a legislative power."

It seems almost too clear for further citation of authority that the ordinance of 1868, conferring the franchise for the use of Division Street, was legislative and not contractual.

In Wabash Ry. Co. v. City of Defiance, 167 U. S., 88; 17 S. C. R., 748, the terms of the ordinance which authorized the railway company to erect new bridges were substantially the same as all ordinances of this character which grant privileges in streets. Mr. Justice Brown holds that this ordinance is not a contract and that its terms are rather those of a license, and points out that the result of holding such an ordinance a contract would be the city's relinquishment forever of the right to improve or change the grade of those streets.

In Binninger v. City of New York, 69 N. E., 390 at 391, Bartlett, Judge, in construing the original resolution of the city of Brooklyn, upon which the defendant railroad company relied in paving between its tracks, holds that the same cannot be regarded as a private contract, but is rather in the nature of charter legislation, which may at any time be amended whenever the legislature deems it necessary in view of changed conditions and the interests of the general public.

We see nothing to be gained in a discussion as to whether ordinances granting rights of any kind in streets are licenses or contracts. As the Court says in Snouffer v. Cedar Rapids Ry., 92 N. W., 79, on page 85: "The power vested in them in respect to streets is of a legislative character, and they cannot restrict themselves nor their successors by any irrepealable ordinance in the exercise of such power over the streets, except it be the express authority of the legislature of the state. The power is a continuing one, to be exercised whenever the public needs may require it."

The only possible confusion that counsel can fall

into is in appealing to the doctrine of the Dartmouth College case as a grant of irrevocable privileges. The principle there laid down and which is still recognized law in every state in the Union, has no application where the franchise in question is a public law relating to a public subject within the domain of the general legislative power of the state, and involving the public rights and public welfare of the community. The Dartmouth College doctrine strictly applies to a private corporation, where the regulation attempted is purely a matter of private concern. The well known facts of the Dartmouth College case bear out this statement, and we do not deem it necessary to go into that question any further.

It will not be forgotten that if plaintiff in error's contention prevailed, the original ordinance must be a contract beyond the power of the legislature, as well as beyond the power of the common council. The result would be that the ordinance of 1868, which gave a right to lay a double track on Division Street, could not have been repealed by any legislature, even though the second track remained unlaid, and no matter what the public necessities might have become.

III. Whether or not the railroad company has title to the soil of Division Street does not concern us. The exercise of the police power may interfere not only with a corporation's enjoyment of a license or a contract, but even with its enjoyment of a fee. As is said in the course of the opinion in Town of Clarendon v. The Rutland Ry. Co., 52 Atl., 1057, and page 1060: "It is a settled principle that every holder of property, however absolute his title, holds it under the implied liability that his use of it shall not be injurious to the

enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property is held subject to general regulations made by the legislature, under its police power, for the common good and general welfare. Cooley, Const. Lim. (6th ed.), c. 16: Com. v. Alger, 7 Cush. 53. Redfield, C. J., said in Thorpe v. Railroad Co., 27 Vt., 140; 62 Am. Dec. 625: "By this general police power of the state, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the state." In respect to impairing the obligations of contracts, he said: "All contracts and all rights * * * are subject to this power; and not only may regulations which affect them be established * * * but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change." Judge Elliott says in Jamieson v. The Indiana Natural Gas & Oil Co., 128 Ind., at page 565: "It is not too much to say that as against the police power there is no such thing as a vested right."

The theory of the complaint is that Division Street is a street of the city of South Bend. It is then not material who dedicated any part of it as a street, nor what steps plaintiff in error took to satisfy the demands of abutting owners.

IV. For the same reasons set out in the preceding section, we deem it immaterial if the grant of 1868 has been acted on for 20 years. On the contrary, however, we submit that that part of the grant which gives the privilege to lay the double track was not acted on at all before the passage of the repealing ordinance. The

single track, it is alleged in the complaint, was built in 1871, relying on the ordinance of 1868. The allegations of the complaint to the effect that the condemnation proceedings with the property owners were carried forth to settle the title between the railway company and these property owners, and to provide sufficient room to lay down a double track, are merely the argument of the pleader. This argument is immaterial, even if true, for the complaint shows on its face that more than 33 years elapsed between the grant of the right to lay the double track and the attempt to do so, and meanwhile the population of the city had increased five times. The same may be said of the allegations of the complaint, which conclude that the railway company was relying on the validity of the grant to lay a double track when it complied with legislation of the city council from time to time as to changing of grades on Division Street, and in planking and in lighting and in watching street crossings. What difference does it make in this discussion whether or not the railway company did rely on the grant of the right to lay a double track? No estoppel can run against the city if it acted in its legislative capacity in making the original grant; "the police power may sleep, but it does not die." The appellant might well rely on the grant of the right to lay a double track, so long as the grant stood irrepealed. Such reliance or expense incurred in acquiring the rights of abutting property owners in the street cannot take away the police power of the council and its right after 33 years' growth of the city, should it find a double track a greater hindrance to travel and menace to life than a single one, to forbid further incumbrance of the street.

V. The repealing ordinance of 1901 is not based upon non-user, and we do not deem plaintiff in error's authorities in point in this controversy. Even on the *assertion* of plaintiff in error under this point, its authorities submitted are by no means conclusive, as they relate to collateral suits, which raise the question of non-user between corporations and private persons, and are not at all pertinent to the present question.

VI. It is well settled in Indiana and by the general weight of authority, that the police power does extend to grants which contain no express reservation. In Thorpe v. The Rutland Ry., 27 Vt, 141, in an action for damages for sheep killed, the constitutionality of the statute requiring cattle guards, which the Vermont legislature had passed after the railroad company had been chartered, was attacked. The charter contained no reservation. The statute was sustained as a police regulation. There is no doubt that the statute imposed an additional burden on the railroad company not contemplated by its charter. The same is true of the statutes in force in nearly all of our states requiring railroad companies to fence their right-of-way. A corporation is subject to the police power just as the individual. The charter makes no difference. An individual is subject to subsequent legislation respecting his property, although it places additional burdens upon its enjoyment. Any other doctrine would amount to this, that the state had lost all control over corporations, except where power was reserved in their original charter. What wonderful attribute does a charter confer on a corporation that it should be argued that a franchise places it above the law? The fundamental idea of corporate existence is simply the conferring upon individuals the ad-

vantages of combining their resources to carry on business, but subject to all the laws to which the original individuals are subject.

In Given v. The State, 160 Ind., 552, the conviction of one Edward Given for permitting the escape of natural gas in violation of an act of the Indiana legislature was sustained. Would a corporation under the name of Given Gas Company have escaped the law of the state of Indiana because the exercise of reasonable police regulations on the part of the state had not been reserved in its charter? The scope of the police power is thoroughly discussed by Judge Elliott in Jamieson v. The Indiana Natural Gas & Oil Co., 128 Ind., 555, leaving no doubt whatever but what the corporation is subject to its regulation, as well as the individual.

VII. We deem it immaterial what effect the railway company's long neglect to act on its right to lay a second track had on its original grant. We insist that in this case it does not stand well in a court of equity; in fact, occupies a position similar to that of East St. Louis Connecting Ry. Co. in its case against the City of East St. Louis, reported in 55 N. E., p. 533, where the grantee company, after the repeal of an ordinance granting it certain rights in the streets, delayed ten years before attempting to exercise any rights under the grant and the city meanwhile doubled in population and extended its streets. Quoting from Pomeroy, the Court holds that the injunction brought by the grantee company to restrain the breach of the ordinance contract amounts to a negative, specific enforcement of that contract, and equitable rules as to laches should be applied. The conditions of the city had greatly changed during the long delay, and as a decree for specific performance

would have been denied, the injunction to prevent the breach of the ordinance contract was refused. But we do not find it necessary to invoke maxims where every fact on the face of the plaintiff's complaint indicates that the repealing ordinance is a clear and reasonable exercise of the police power. The original grant, as plaintiff in error says, was perspective. It was a legislative action on the part of the granting body and must have been made in view of the extension and growth of the city, and in view of the fact that public necessities in the future might render its modification or repeal necessary.

In Gale v. Kalamazoo, 23 Mich., 343, Cooley, Judge, in discussing the contract of the village of Kalamazoo which related to the location and control of a market house for the village, says (p. 353):

> "It will not do to say of such a contract that it must be assumed to have been reasonable in view of the actual condition and wants of the village, and of its probable growth and future needs. What would be thought proper for the village this year might be found worse than useless the next, and no official prescience could determine with absolute or even tolerable certainty what changes a few years might work. Indeed it is impossible to predict reasonableness of any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise. Those powers are conferred in order to be exercised again and again, as may be found needful or politic, and those who hold them in trust today are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transmit them unimpaired to their successors. This is

one of the fundamental maxims of government, and it is impossible that free government with restrictions for the protection of individual or municipal rights could long exist without its recognition."

VIII. Plaintiff in error insists on working out an estoppel against the city and relies on allegations in its complaint that it acted upon the ordinance of 1868 and expended money on the strength of the ordinance and that therefore the grant could not be revoked. As before stated, we insist that there is not a fact on the face of the complaint which shows that plaintiff in error has spent one dollar for a second track on Division Street between Michigan and General Taylor Streets. Whatever action it took in reliance on its original grant is only consistent with its exercise of its intention to maintain a single track railroad. The railroad's litigation with the property owners may or may not have been carried on in view of two tracks in the street. It is rather late for plaintiff in error to proclaim that this old litigation had in view the laying of a second track. Litigation is generally a struggle over present conditions and not future possible needs. We repeat that it is immaterial what plaintiff in error did, relying on the strength of the ordinance of 1868, and with the utmost charity in extenuation of the railway company's thirty-three years of inaction, we again insist that statutes of limitation and estoppels do not run against law-making bodies or instruments of government. State ex rel City of St. Paul v. Minnesota Transfer Ry. Co., 80 Minn. 108, 83 N. W. 32. Rissing, et al vs. City of Ft. Wayne, 137 Ind. 427.

IX. The question whether or not Division Street is wide enough to accommodate trains on two tracks running longitudinally as well as the public who must walk and drive on the street, is not for the railroad company to settle in its pleading, and the demurrer admits nothing on this subject. This was a legislative question for the common council to decide and the courts will not interfere with the exercise of legislative power unless it clearly appears that the council acted in bad faith or without legislative authority. There are no such allegations in this complaint and the reasonableness of the council's action in repealing the grant to lay the second track must be presumed. Any allegation as to the unreasonableness of the action of the council is surplusage and the court would refuse to hear evidence that the repealing ordinance was unreasonable.

Cleveland, etc., Ry. Co. v. Harrington, 131 Ind. 426, was an action against a railway company for personal injuries received by plaintiff at a street crossing. An ordinance of the City of Indianapolis forbade a speed of more than four miles an hour at this point. The railway company contended that this ordinance was unreasonable and void. Held the Court did not err in refusing to hear evidence that the ordinance was unreasonable. The ordinance was a police regulation and the judgment of the Indianapolis council is final as to its reasonableness.

In Jamieson v. Indiana Natural Gas & Oil Co., 128 Ind. 555, the question was as to the validity of an act of 1891 which regulated the pressure which should be placed upon natural gas confined in pipes. In considering the statute, the court says (pages 561 and 562):

"If, to descend from a wide generalization to a narrow one, a subject is within the police power of the state, the question as to what regulations are proper and needful is one for legislative consideration and decision. It is a cardinal principle of law that legislative discretion can not be controlled by judicial decisions, and is not subject to judicial surveillance."

"As the regulation prescribed by the statute is not one which appears on its face to be destructive of commercial interests or property rights, and as there is nothing in the complaint indicating a purpose to oppress or destroy, we can not, nor can any court, presume that there was any other purpose than the just one of regulating the use of essentially dangerous property for the good of the community. As there is power to regulate the use of property, the measure of regulation must, to a very great extent, be within the discretion of the legislature."

In City of Peru v. Gleason, 91 Ind., at page 576, speaking of the question whether the drain which the city agreed to construct would be of public benefit or not, the court says:

"The determination whether such outside lands are, or continue to be, a nuisance and injurious to the city, is a matter for the legislative determination of the common council. It can not surrender this power reposed for the public welfare."

In Fry v. State, 63 Ind. 552, in discussing the constitutionality of the act of March, 1875, regulating the issuing of railroad tickets, as a proper exercise of the police power, on page 560 the court declares that, "it is neither the province nor the duty of the court to call into question either the policy or the wisdom of any act

of legislation." The court therefore confines itself to the discussion as to whether the legislature exceeded its legitimate power under the state constitution.

In the Columbus Gaslight & Coke Co. case, 33 N. E. 292, the gas company's grant gave it the right to lay and maintain pipes in the streets and the city afterwards undertook to change the grade of one of the streets in which pipes were maintained under this grant. The change of grade necessitated the relaying of the pipes. The gas company asked for a judgment against the city for the expense of relaying the same. Held: that the plaintiff could not recover. The primary use of the streets is not for laying gas pipes, but the accommodation of public travel and the city is under a continuing duty to preserve proper grades for the streets and this is a legislative duty, in the exercise of which the legislative power cannot be abridged. The presumption is that the city acted lawfully and without negligence.

In Wabash Ry. Co. v. City of Defiance, 17 S. C. R., on page 753, the court says:

> "We are not at liberty to inquire whether the discretion vested in the common council of determining this question was wisely exercised, or what the motives were for making the change, or whether the crossing so improved was burdensome in the railroad company, or made unsafe to persons crossing the track. There were considerations which might properly be urged upon the common council as arguments against the proposed change, but it is beyond the province of the courts either to praise the wisdom or criticise the unwisdom of such action. The question between us is simply whether the council had the power to make the change, and of this we have no doubt."

In the Wabash case, it will be observed that the court declined to enter into the legislative question as to the resonableness of an ordinance abolishing overhead bridges and substituting grade crossings, and in the case of New York & N. E. Ry. Co. v. Town of Bristol, supra, the court declined to go into the question as to the reasonableness of a statute which abolishes grade crossings. In these cases totally different objects were sought to be accomplished by the exercise of the police power and the courts refused to go into the question of expediency.

At this point we again call the court's attention to the theory of plaintiff in error's complaint which is that the city violated the obligation of a contract and the complaint is wanting in allegations to show that in the repealing ordinance of 1901 the city council acted in bad faith or without legislative authority.

X. The history of the Grand Trunk railroad in Division Street certainly negatives any charge that could be made that the city was acting outside of its police power in repealing the unexercised part of the grant. From 1868 to 1901 is an interval of thirty-three years in which time the city had grown from 7,206 population to 36,000 population. In the face of these facts, counsel for plaintiff in error would argue that two tracks longitudinally running through a street of a city of 36,000 population and crossing intersecting streets would not increase the danger to the public and put additional burdens on traffic. This argument has no standing whatever, and any allegations as to two tracks being no more burden than one would not be considered as evidence. The court knows otherwise of its own judicial knowledge. As the court says in the Jamieson

case, 128 Ind., at page 574, "What is judicially known to be false no pleading can effectively aver to be true."

XI. The protection of the lives and property of citizens is the highest object for which legislation can be invoked. Police power has been asserted for objects of much less importance.

In International Text Book Co. v. Weissinger, 160 Ind. 349, the police power is invoked to prohibit the assignment by employes of future wages. The purpose of such legislation is well understood to be to protect wage earners from the consequences of their own improvidence.

In Fry v. The State, 63 Ind. 552, we find the police power invoked to restrain ticket brokers from scalping railway tickets.

In Adams Express Co. v. The State, 161 Ind., 328, an act of the Indiana legislature is sustained which regulates the business of express companies and forbids discrimination.

In Given v. The State, 160 Ind., 552, an act is sustained which regulates the manner of sinking gas wells to prevent the escape of gas.

In State v. Woodward, 89 Ind., 110, the Supreme Court of Indiana adopts the doctrine of Stone v. Mississippi, 11 Otto, 841, which holds it to be within the police power of the state to abolish lotteries.

In Barbier v. Connolly, 113 U.S., 27: 5 S.C.R., 357, a city ordinance is sustained which requires certificates as to the sanitary condition of laundries.

In Columbus Gaslight and Coke Co. v. Columbus, 33 N. E., 292, the right of the city to improve its streets without liability to a gas company whose mains had to be removed and relaid is sustained.

The well known slaughter house cases in 16 Wallace, 36, furnish additional examples of the scope of the police power.

We refer to the above authorities particularly to call the court's attention to the fact that the City of South Bend in enacting the repealing ordinance of 1901 was performing the highest duty which the governing body of the state or municipality is called upon to perform, namely, the safeguard of human life. It is not a question of the acts of the city in the exercise of the police power being defensible by a narrow margin. We insist that the city of South Bend has never exercised the police power delegated to it to better advantage.

Permit us to say before entering upon a discussion of the points, authorities and argument in the brief of plaintiff in error, we regret that the scope of its brief is such that we must necessarily, in the discharge of our duty to our client, draw somewhat on the time and patience of this court in answering it. We shall, however, be as concise as circumstances permit, trusting that a short analysis by us of the cases cited by plaintiff in error will materially lesson the labor of this court.

III.

Consideration of Points Made and Authorities Cited in Argument of Plaintiff in Error.

First.

Counsel for the railroad company contends under this point that it is for "The supreme court of the United States determines for itself whether there is an existing contract, and where there is an adversity

of state decisions the first in time may constitute the obligation of the contract and he measure of he rights under it."

This is the statement of a familiar rule. In support of the last clause of this proposition counsel contends that the supreme court of the State of Indiana in its earlier decisions held that an ordinance of the character in question in this case was an irrevokable grant, admitting, however, that there may be diversity of Indiana decisions upon this question. It is to be noted that counsel does not under this point cite any Indiana authority showing the priority and conflict of decisions in that state.

The Indiana Supreme Court in Indianapolis & Cincinnati R. R. Co. v. State ex rel City of Lawrenceburg, 37 Ind. 489, held that an ordinance of this character is not a contract between the railroad company and the city, but simply a grant of the right of way upon certain conditions and duties subsequent to be performed by the company. This is one of the earliest, if not the earliest, statement of the law by the supreme court of the state of Indiana on this question, and is approved and followed by the Indiana Supreme Court in two recent cases, namely, The Vandalia Ry. Co. v. State, ex rel, 166 Ind. 219, and the other, Indiana Ry. Co. v. Calvert, 168 Ind. 321. The courts of Indiana have drawn a distinction between ordinance contracts made by the city in its business capacity, and ordinances adopted in the exercise of its legislative control over streets. The conflict of authority which counsel says obtains in that jurisdiction must grow out of the failure of counsel to make this distinction in the reading of the Indiana cases.

Second.

We agree with plaintiff in error on the second point made in the argument to the effect that South Bend has general jurisdiction over its streets and had ample authority to grant the railroad company's predecessor in title the right to lay one or two tracks in Division Street, and therefore pass over authorities discussed. It does not follow, however, that the grant was not made subject to the police power and that that part of the ordinance relating to double tracks and which was neglected for thirty-three years could not be recalled as public convenience and safety required it. For, it is the settled law in the state of Indiana that cities do have plenary powers over streets and may by ordinance regulate the use and occupancy of same, and that this authority extends to the regulation of franchise rights upon the streets. Indiana Railway Co. v. Calvert 168 Ind. 321 (324). Indianapolis, etc., R. R. Co. v. State ex rel, 37 Ind. 489. Citizens Gas, etc., Co. v. Town of Elwood, 114 Ind., 332.

On page 20 of plaintiff in error's brief in very conspicuous black type is a question which involves the assumption that because seven tracks did not interfere with the public at a street crossing in the city of Indianapolis that therefore two tracks ought not to interfere with the public in the city of South Bend. We again submit that this is a legislative question for the common council of the city of South Bend to decide, and plaintiff in error has not alleged that the council acted in bad faith or outside of its legislative authority. No allegations or argument can alter the fact that steam railroad tracks in a city street are an absolute

burden and menace to life, and to prevent their construction the governing body may well exercise the police power.

Counsel for plaintiff in error in discussion of his second point in his brief at page 19 cites, Indianapolis & Cincinnati R. R. Co. v. the State, ex rel, City of Lawrenceburg, 37 Ind. 489, and quotes therefrom. That case involved the power of the city to compel the railway company to maintain its crossings over streets and highways, and in the course of the opinion the court say, with reference to the company's franchise ordinance that had been granted by the town of Lawrenceburg: "But this ordinance is not a contract between the railway company and the city, but simply a grant of the right of way upon certain conditions and duties subsequent to be performed by the company." This case was quoted with approval in the Vandalia case hereinbefore referred to.

Counsel also cites Dwenger v. Chicago & Grand Trunk R. R. Co., 98 Ind. 153, stating that this suit was brought by an abutting property owner and involved the right of the present defendant in error to grant the ordinance now in question to the plaintiff in error. It is true this question was indirectly involved in the case, but the main question was whether an abutting property owner was entitled to damages from the railway company by reason of its occupancy of the street for railroad purposes under the grant made by the city. The court held, the abutting property owner had no cause of action against the railway company in the circumstances as he sustained only such injury as the general public sustained in the railway company's use of Division Street. It is true, the court there did hold

that the city had the right to grant the franchise in question as against the private interests of the abutting property owner, but it did not hold that that grant was not made subject to modification and control under the police power vested in the city for the protection and safety of the public, which is the question involved in the case at bar.

Third

Under the third point counsel cites Williams v. Citizens Ry. Co., 130 Ind., 71 (brief p. 24) as sustaining the proposition that the ordinance in question was a contract which a municipality can not subsequently impair.

That case involved the right of an individual to move a house longitudinally along the lines of the defendant railway company, and the court held that the owner of the house could not insist on so moving it to the material interference with the operation of the railway system. Although the litigation was between a house mover and the railway company, the decision in favor of the railway company was put upon the ground that public convenience required that the operation of the railway company's system should not be interfered with by the moving of the house in the manner proposed, the court viewing the question from the standpoint of neither of the parties to the suit, but that of the public.

In the case at bar the City of South Bend directly represents the public interest and by the passage of the repealing ordinance in question exercised its police power for the public benefit. We supplement the quotation of counsel from that case by an excerpt from the

same page of that very opinion. Referring to the railway company's franchise the court say: "It is undoubtedly true that all such rights are subordinate to the paramount power usually denominated the police power, for that power can not be annihilated by contract. Jamieson v. Indiana, etc., Co., 128 Ind., 555. See also authorities cited in Elliott on Roads and Streets, 573, note. But here no question concerning the nature of that great power is presented."

We have already called this Court's attention to Indiana Ry. Co. v. Calvert, 168 Ind. 321, which also involved the rights of the railway company and an individual in respect to house moving along streets occupied by a railway company. And the Calvert case clearly sustains our position as to the power of the city to regulate the use of grants made by franchises, and if there be any conflict between the law laid down in the Williams case and the Calvert case (which we do not concede), the Calvert case, being the later, is the law of Indiana.

In regard to the case of the city of Indianapolis v. Indianapolis Gas Light &Coke Co., 66 Ind., 396, we fail to find anything in that case that denies the character of legislation to grants by municipalities for rights in streets, and even if dicta therein could be so construed, the construction would not be consistent with the general doctrine of our supreme court. We call the court's attention to the fact that the only question there was whether the city should or should not pay said company for the gas which it had originally contracted for and refused to take. There was absolutely no question of police power.

We again refer to the distinction made in the case

of Meyer v. Town of Boonville, 162 Ind. at the bottom of page 167.

Plaintiff in error next cites, Western Paving & Supply Co. v. Citizens Street R. R. Co., 128 Ind., 525. We submit that the question in that case was not one of the exercise of the police power to promote the safety and convenience of public travel, but it was a question as to who should pay for paving a street. The council sought to impose an additional financial burden for paving beyond that in the original grant. This was not an exercise of a police power. The dicta cited is perfectly consistent with the general doctrine always held by the Supreme Court of the State of Indiana. The dicta does not declare that the city can not, in the exercise of its police power, interfere with former grants to corporations using its streets. These grants are not irrepealable contracts in the sense that they are above all law.

In the city of Indianapolis v. Consumers Gas Trust Co., 140 Ind., 107, cited by the plaintiff in error, the city authorized a gas company to lay mains in the streets and incidentally to keep them in repair. Later the city in substance forbade cutting into the pavements of the city without a permit and a large bond with other onerous conditions beyond the original grant. The court recognized, on page 116 of the opinion, that by such grants the city "does not part with or bargain away its rights under the police power to protect the public safety." The ordinance in question forbidding the right to cut into the pavements is held not a proper exercise of the police power. In other words, this particular act of the city did not come within the scope of the police power—a very different case from the case at bar. We submit that the repealing ordi-

nance of 1901 in the case at bar which simply prevented an additional obstruction to public travel and an additional menace to public safety did come within the scope of the police power.

Counsel confuses the lines of decision in the State of Indiana and other states, drawing distinction between the exercise of legislative power by a municipal corporation and the exercise of its business functions in making contracts; one being subject to the exercise of its police power and the other not. And it is true in some of the older cases in other jurisdictions than that of the state of Indiana this distinction was not clearly drawn. Nor was the distinction between the right of the state to exercise the police power as against a private corporation and a quasi public corporation always clearly marked. Some of the courts at one time seem to have been of opinion that the Dartmouth College doctrine had made every corporate franchise a sacred, irrepealable contract beyond the reach of the legislature, unless in the franchise itself there could be found some reservation. It is true that Justice Marshall's dicta in the Dartmouth College case furnished ground for such belief. The donors, the trustees and the crown were the original parties to the Dartmouth College grant, and the acts of the New Hampshire legislature impaired the franchise which the first two named parties enjoyed. Dartmouth College, however, was a private corporation and was not engaged in the performance of public duties, and the legislation attempted by the New Hampshire legislature was purely a matter of private concern. It was not a question of the exercise by the state of New Hampshire of its undoubted powers to protect and safe-guard lives, property and the welfare

of its citizens. Some confusion followed the Dartmouth College decision, some lawyers being of opinion that the state had parted with much of its control over corporations, and this idea prevailed in many of the older cases which discuss the nature of corporate franchises. The confusion has practically disappeared and the scope of the Dartmouth College doctrine is not less today than the original facts of that case justified, and we know of no modern cases which hold that the Dartmouth College doctrine forbids a municipality from exercising its police power for the proper control of its streets, even though franchises of corporations operating on these streets are effected thereby.

Counsel quote extensively from Mayor, etc., of Knoxville v. Africa, 77 Fed., 501 (brief p. 29) to sustain its position that Ordinance No. 62 was in no degree revokable. The Africa case involved the right to certain streets in the city of Knoxville and was a suit between rival street railway companies for the occupancy of certain occupied and unoccupied streets in Knoxville, one of the parties claiming the right to the possession of the streets in question under a franchise granted by the city of Knoxville specifically designating the streets in controversy, the other under the blanket provisions of a prior charter from the state and a franchise from the city which specifically named some of the streets in controversy, and "all other streets or extensions of streets within the corporate limits hereinafter to be made, established and opened." In that case the statute of Tennessee required that the name of the particular city in which the railway was to be constructed and the termini and proposed general route thereof within the city should be stated in the applica-

tion for the charter from the state. The application for the prior grant in addition to defining a specific route described in a general way other routes without any specific beginning or ending, adding, for full measure, the blanket provision above quoted.

Mr. Justice Lurton in his opinion in that case, speaking for the court, held simply this: That under the statute of Tennessee the grant by the city was valid as to the route specifically described in the application for the charter and void as to all other streets, making the decision turn upon the question of the power of the city under the particular statute of Tennessee. The question of the police power of the city of Knoxville was not involved and hence cannot be successfully appealed to in the case at bar as authority.

Counsel say at page 31 of the brief that if South Bend in its revoking ordinance had any right to revoke upon any ground upon which the police regulation might have been asserted it should have been recited in the revoking ordinance as a ground for revocation. The complaint does not contain a complete copy of the revoking ordinance nor is there any direct negative averment in the complaint that such ground was not expressly stated in the revoking ordinance, and as the presumption of law is in favor of the validity of the ordinance if it were necessary to the validity of the ordinance to set up the ground of revocation, this court will presume that such grounds were stated. However, we contend that the ordinance, having been passed under the police power of the city it was not necessary for the grounds of revocation to be stated in the revoking ordinance.

Fourth.

In the fourth subdivision of plaintiff in error's brief (p. 32) counsel say that "we do not contend that the interest of the abutting property owners can be destroyed or impaired under this or any other ordinance without compensation." We deem it sufficient to answer this paragraph to say the compensation to abutting owners cannot affect the relations of the city and the railroad company. But counsel seem to argue that because the railroad company acquired the title to the soil in Division Street that this furnishes a legal reason why the repealing ordinance can not stand. Counsel cites Burkham v. Ohio & Mississippi Ry. Co. et al, 122 Ind. 344, 345, quoting an excerpt from the opinion in that case, which states the relative rights of a railroad company and the abutting property owner in the streets. We deem it immaterial whether or not the railroad company had title to the soil, but if the case last referred to above is cited as holding that it does, we submit that such is not the holding in that case. The Burkham case simply holds, an abutting property owner who expressly consents to the occupancy of a street can not afterwards ask a court to enjoin the use of a street or award him damages. The estoppel arises as soon as a grantee acts upon the owner's consent. The case decides that the making of the grant by the city is done under the power delegated to the city by the state. This indicates that the city is acting under its legislative capacity and it follows that whenever public necessities require it, such grants could be altered, amended or repealed. Railway companies do not occupy any better position because they may have appropriated the right to occupy the street as against the abutting prop-

erty owner for the reason that that right was not superior to the rights of the public in the street.

We deny that by any grant plaintiff in error got such a title to the soil of Division Street as to prevent the city from legislating for the protection of traffic and life.

Fifth.

Plaintiff in error's fifth proposition relates to the question of forfeiture of its franchise on the ground of non-user. We do not care to argue this proposition because the repealing ordinance of 1901 rests upon stronger grounds than that of forfeiture or non-user, and we do not propose to be led off into by-ways in this argument. We would suggest that plaintiff in error is not in position to boast of its standing in a court of equity, and in this connection would again call the court's attention to the East St. Louis case which we have discussed on page 51 of this brief. It is also stated on page 34 of the brief of plaintiff in error that the repealing ordinance fixes no time within which either the single or double track shall be put in and no date for commencing the work; that not a single forfeiture clause appears in this ordinance and that no right to repeal, modify, change or partition the ordinance is reserved in the ordinance itself. We inquire how this court is to know these facts. How can this be successfully contended in the absence of a negative averment in the complaint upon each and every one of these points, and, in the absence of a complete copy of the repealing ordinance? The natural inferences and implications are all

against the pleader on these points. It does appear, however, from the averments of plaintiff's complaint that there was a non-user of the privilege of laying double track for many years prior to the passage of the repealing ordinance, and, as the portion of the street in controversy had not been used for double track purposes at the time of the passage of the repealing ordinance, the issue here is simplified and narrowed to such a degree that the only question is as to the right and power of the city to protect the public concerning the portion of the street that had not been used for double track purposes.

Counsel on pages 36 and 37 of the brief and under this point argue that there can be no revocation of a franchise ordinance where no power to revoke is reserved. We have already taken up this subject in our main argument and do not wish to repeat (see ante p. 36). We declare that every grant to occupy streets is subject to the police power. Nor do we see that it is material where the fee in the soil rests. The city had the right to regulate travel on Division Street in any event for public convenience and safety.

Sixth.

Under subdivision six counsel for plaintiff in error discusses the proposition that the grant having been made and acted on for over twenty years, the franchise can not be successfully assailed, and viewed as a contract it can not be altered or repealed. We submit that this is a broader statement than is warranted by the facts averred in the complaint. As to the portion of the

street in controversy it affirmatively appears from the allegations in the complaint that the street had not been used for double track purposes from the passage of ordinance 62 in 1868 to the time of the passage of the repealing ordinance in 1901. So far as facts are concerned, the particular part of the ordinance with reference to double tracking between Michigan and Gen. Taylor Streets was not acted upon by the railway company or its predecessors in title. It is true it is averred in the complaint as to what the railway company intended to do in the future with reference to the construction of a second track, but the statement of intention is not evidenced by any overt act and is simply a statement of opinion of the pleader.

We call the court's attention to the fact that the city repealed the grant of the right to build a second track after thirty-three years had changed conditions surrounding Division Street and its intersecting streets and after the city had grown to be five times as large as it was in 1868. Counsel in black type say that the City of South Bend, more than twenty years ago, stood silently by and permitted the purchases to be made from the property owners, proceedings to condemn to be instituted, and large sums of money to be paid out without objection, and for this reason would invoke an estoppel against the city. We fail to see the force of this argument as no estoppel can be successfully invoked against the city within the scope of its police powers even though it were a stockholder in the railroad company. The mere holding of the railway stock by the city in its business capacity could not limit its legislative control over its streets or divest it of any of its police powers, nor can any length of time bar a proper ex-

ercise of the police power. "The police power sleeps, but it never dies." There might be some strength in the argument under this subdivision if the city were attempting to remove the single track now on Division Street laid more than thirty-three years ago, but there is no such issue in this case. On page 43 of plaintiff in error's brief it would challenge the right of the city to exercise the police power after a certain period of time, perhaps eight years, eleven years or twenty years. Again we repeat that the police power is not one of the subjects of the statute of limitations. There is nothing to show at what point in the history of South Bend or in its growth the double tracking of Division Street between Michigan Street and Gen. Taylor Street became injurious to the public interest. There could be no laches until the city could have acted. In the judgment of the common council the time to act came in 1901, and when it acted it exercised the police power—a power which it could have used years before if in its judgment the action had demanded it, but not a power which it necessarily was obliged to use until in its judgment the safety and welfare of travelers on Division Street demanded it.

Seventh.

In the seventh subdivision counsel argues the fact that the mere failure to exercise the right to lay down the second track did not extinguish its right to do so. We submit that it is not a question whether the failure to exercise a right to lay the second track extinguished plaintiff in error's right to do so. We call attention to

the fact that the City of South Bend extends its commerce, increases its business and grows with the better development of the country, and the necessities of protecting its citizens do from time to time force themselves upon the city's attention. It is a matter of common knowledge that powder mills and slaughter houses have from time to time become almost surrounded by the growth of nearby cities. These establishments may antedate the city itself, nevertheless, they must yield to the police power, and when the judgment of the proper law making body deems them a menace to public safety or health they must move, and it is worth while to note that their arguments are very similar to the argument of plaintiff in error in this case, and so far as "rules of property" and "vested rights" are concerned, their claims are stronger.

We deny that by any provision of ordinance No. 62 the city bartered away or could have bartered away its legislative power to protect life and property upon Division Street. Plaintiff in error on page 48 of its brief again refers to the question of abandonment and non-user and cites City of Columbus v. C. & S. Ry. Co. 37 Ind. 299. Again we say that this is not the issue in this case. We will not follow counsel into this discussion as it is outside of the issues in the case at bar. Nor is the City of South Bend attempting to interfere with tracks already laid in Division Street or a part thereof which had already been used by the railway company for track purposes as was the case in the 37th Indiana cited by plaintiff in error. The City of Noblesville v. Lake Erie & Western Ry. Co. 130 Ind. 1, and also the case of White v. Chicago, St. L. & P. R. R. Co. 122 Ind. 317, also cited by plaintiff in error at page 49 and 50

relate to forfeiture for non-user and for that reason are not in point here. However, the Noblesville case clearly recognizes the city's right to exercise the police power over a street although that street is occupied by a railroad. The court say, "The control over the highway is not taken from the municipality for it may still exercise the police power over it. The only limitation is that which grows out of the right to use it for railroad purposes. The use of a highway for a railroad is a public use and is not necessarily destructive of the character of the public way."

The case of Chicago, St. Louis & P. Ry. Co. v. Eisert, 127 Ind., 156, cited on page 50 of plaintiff in error's brief, was a suit by an abutting land owner. The point decided was that the railway company was within the terms of its grant from the city. It is only held that two tracks were authorized by its grant and the abutting property owner could not restrain the laying of same. The city may find, before a second track is laid, that during thirty-three years of growth more than one track would not only be an inconvenience but a positive danger to the public, and at the top of page 52 of plaintiff in error's brief it argues therefore that if the abutting owner had no right to restrain the laying of the second track, then the city had no right to do so. (Brief p. 53). To which we answer that the city is not urging its right to prevent the construction of the second track on the same ground urged by the abutting owner. Plaintiff in error says that it cannot be possible for a city to revoke its grant and the abutting owner not to revoke his. (Brief p. 53.) On the contrary, we insist that it is entirely possible and may become necessary in the case of the city to revoke its grant, and we

call plaintiff in error's attention to the fact that the city has powers and duties not possessed by the abutting owner. The precise question, plaintiff in error says, was determined in Africa v. Board, etc., 70 Fed. 728. That was a case of a grant from the legislature. The city could only consent and this consent conferred no right. (P. 734.) The city had no control of the streets in question. The opinion says: "This leaves untouched questions of police powers." The contract and its limitations are between the legislature and the railway company. The city had no control as have cities in Indiana.

We beg to add that the authorities cited by plaintiff in error which refer to cases wherein grants come from the legislature and the city's consent confers no rights are not in line with the law of Indiana, and are only confusing in this argument.

Stress is laid on the quotation from the Africa case to the effect that franchises acquired in streets of cities are irrevokable. We are warranted in assuming that counsel cite this case to prove that where public necessity and the protection of life requires the reasonable restriction but not the destruction of the right-of-way, the city can not restrict the use under its police power. In this connection we again direct the court's attention to Mayor of Baltimore v. Baltimore Trust & Guaranty Co. 166 U. S. 673. Mr. Justice Peckham in that case avoids declaring that all such grants are irrevocable. He finds it sufficient for the decision of that case to hold that the terms of the grant were not substantially changed and that the city had merely exercised a power to make a reasonable regulation concerning the use of Lexington Street in Baltimore, and that the original

contract (assuming that one existed) was entered into subject to the right of the city to adopt such a regulation. If plaintiff in error seeks to rely upon the opinion of Mr. Justice Peckham in this case and claims that the regulation attempted by the City of South Bend does materially modify and impair the grant of 1868, we would simply ask for a comparison of the facts in the two cases. The facts in the two cases are very similar and the repeal of the original grant in both cases relates to but a few hundred feet of track, less in the case at bar than in the Baltimore case, and it is apparent that peculiar and exceptional conditions exist in the case at bar as well as in the case cited. We quote from the opinion of Mr. Justice Peckham as follows:

> "Upon the facts already set forth, a sufficient foundation was laid for the exercise of a fair and reasonable legislative discretion in determining the question whether the portion of the street mentioned should be occupied by a single or double track of the railway company. A regulation of that portion of the street by subjecting it to the use of but one, instead of a double, railway track did not (in our judgment) thereby materially modify, nor did it, in effect, prohibit, the exercise of the privileges previously granted by the city to the railroad company; nor did it impair the obligation of the contract or destroy vested rights; nor was this regulation substantially inconsistent with the terms of ordinance No. 23. While that ordinance provided generally for double tracks through the streets mentioned therein, the reduction of the right to use two tracks and the granting of the right to use but one for such a comparatively short distance in one particularly crowded and narrow thoroughfare, was not a regulation inconsistent with the terms of the original ordinance. It would,

we think, be unreasonable to hold that the least limitation of the power to operate double tracks was an infringement and impairment of the contract as set forth in the ordinance. In our opinion, the ordinance does not give any such cast-iron right, or one which shall be beyond any reasonable limitation and supervision by the city. It granted the use of the streets for double tracks for many miles, and the subsequent limitation of that use to one track related to but a few hundred feet, where peculiar and exceptional conditions existed, where the danger to be apprehended from the use of electric cars on double tracks in a narrow and busy thoroughfare was very great, and where it might fairly be decided by the common council that double tracks at that point would be an unreasonable and dangerous use of the street by the company, and directly tend to prevent its reasonable and safe use and enjoyment by the public at large."

Eighth.

Plaintiff in error in its eighth proposition invokes estoppel. We against insist that a state or municipality can not be estopped from exercising its public duties through the police power.

We contend it makes no difference whether the privileges granted the railway company under ordinance 62 be denominated by plaintiff in error as a contract or a license, in either case those privileges were granted subject at all times to the police power of the city council and it is never too late to enact legislation in the proper exercise of the police power. Plaintiff in error argues that because the city did not fix the time within which both tracks should be laid, it thereby deprived itself of the right to adopt reasonable legislation for the occu-

pation of Division Street. There is no averment in either paragraph of the complaint that there was no time limit fixed and there is no complete copy of the ordinance set out in the complaint, and therefore the court would have to assume from counsel's statement that no time limit was fixed. This, in accordance with well established rules with reference to the construction and force of averments of pleading, the court will not do.

Under proposition eight counsel for plaintiff in error, cite Buchanan v. Logansport & Crawfordsville & W. R. R. Co., 71 Ind., 265. This case has no analogy to the case at bar for the reason it did not involve any question of police power or the relative rights and duties of cities and railroad companies in city streets. The question decided in that case was that the railroad company, having under license from Buchanan constructed its line across his property, could not be ousted from the land occupied. We have no quarrel with the law of that case. The facts in Lane v. Miller, et al, 27 Ind. 534, also cited by counsel are analogous to the facts in the Buchanan case. Miller and others under parole license from Lane constructed a mill and dam upon the land of Lane, and the only question decided in that case was that Lane was estopped from revoking the license unless the licensees could be placed in statu quo.

In New Castle v. Lake Erie & Western Ry. Co. 155, Ind., 18, referred to at page 61 of the brief, the town of New Castle sought to compel the railroad company to remove all of its railroad tracks from a street in that town, which had been occupied by the railroad company for more than twenty years without any express grant. The court held that the user for more than

twenty years raised a conclusive presumption of a grant. And that "it was exclusive to the same extent it would have been exclusive under express grant, that is, the town by an express grant could not deprive itself of governmental and police powers over the part of the street occupied by the track." (p. 26.) With reference to the exact issue in that case the court say that if the appellee had a valid right to use the streets the town's governmental and police powers would not be abated or diminished, but that "the complaint, however, is not based on appellee's refusal to obey regulations of the use but is founded on the claim of appellee's usurpation." In this case the question is merely the regulation of the use of the street. The city does not deny the plaintiff in error's right to any right-of-way whatsoever along that street.

Ninth.

Under the ninth point plaintiff in error argues (brief p. 63) that ordinance 62 created a property right in the nature of an easement which the city has no power to destroy and cite Tate v. Ohio, etc., R. R. Co. supra, to the effect that the right to use a street in a town adjoining a lot and abutting upon it is as much property as the lot itself and the legislature has as little power to use the one as the other. The Tate case was a suit between an abutting property owner and a railway company, Tate claiming special damages because an embankment constructed along the center of the street in front of his lots prevented ingress and eggress thereto. The court simply held that under this state of facts Tate was entitled to recover damages not-

withstanding the grant from the city to the railway company to use the street for railway purposes. Plaintiff in error, to avoid the claim made against the railroad in the Tate case, acquired the fee to the soil in Division Street which was theretofore held by the abutting property owners, but the fee when resting in the abutting property owner was subject to the public use for street purposes, and was acquired by the plaintiff in error subject to such use and the right of the city to regulate traffic and protect life upon the street was as complete and ample after the fee was acquired by plaintiff in error as when held by the abutting property owners, and when plaintiff in error acquired the right as against the property owner to construct two tracks along Division Street it did so with full knowledge that under the law the city had the power to restrict the use thereof to one track if necessities produced by the growth of the city and the traffic upon Division Street made it essential for the city to do so, to promote public safety. The fact that the plaintiff in error did acquire the fee to the soil did not divest the city of its easement in Division Street as public necessities may require. Mayor, etc., of Knoxville v. Africa, 77 Fed. 501 also cited under this proposition has been heretofore (p. 67) fully discussed, and its inapplicability to the case at bar plainly shown.

Tenth.

Under this point counsel discusses the distinction between regulation and destruction under the police power, the necessity required and the degree of reasonableness demanded in the exercise of such power in

each case. The argument made under this head is so completely and conclusively answered by the supreme court of the state of Indiana in the opinion upon the rehearing of this case in that court (record pp. 58, 59, 60), that the restatement of the reasons there assigned and the authorities there cited to sustain the repealing ordinance against this attack would be but repetition. We would simply direct the court's attention to the fact that under this subhead plaintiff in error cites only Illinois cases, with one exception. That exception is the Western Paving & Supply Co. v. Citizens Street Railway company, 128 Ind., 525. As we have already stated (ante p. 65) the question in that case was not one of the exercise of the police power to promote the safety and convenience of public travel, but a question as to who should pay for the paving of the street.

To sustain its contention that the ordinance in question does not simply regulate property but destroys it, plaintiff in error cites Lakeview v. Rose Hill Cemetery Co., 70 Ill. 191 (brief 71), and quotes extensively from the opinion of the Illinois Supreme Court in that case which held an act of the legislature unconstitutional under which the town of Lakeview sought to restrain the cemetery company from using the lands in controversy for cemetery purposes. To this opinion we oppose the opinion of Mr. Justice Holmes in Laurel Hill Cemetery v. City and County of San Francisco et al 216 U. S., 350, 365. The state of facts are practically the same as those in the Rose Hill Cemetery, except that it was an ordinance of the City of San Francisco which prohibited the further use of the cemetery for burial purposes instead of it being an act of the legislature. In that case the land in controversy when first used for

burial purposes was outside of the city limits of San Francisco and a mile or two away from dwellings and business. The land had been used for many years for burial purposes, forty thousand lots having been sold in it and over two million dollars spent by the lot owners, as well as large sums by the cemetery owners, in beautifying and embelishing the grounds. The land still unsold was estimated to be worth seventy-five thousand dollars. The city had received $24,139.79 from the owners of the cemetery as consideration for the land and this sum was retained by the city at the time of the passage of the ordinance prohibiting burial therein. The supreme court of the state of California upheld the validity of the ordinance and this Court in its opinion sustained the opinion of the California court and held that the ordinance was a valid exercise of the police power of the city of San Francisco and that it did not invade any constitutional right of the cemetery owners.

White vs. Chicago, etc., R. R. Co., 122 Ind., 317, is again cited by counsel (brief 78), with the statement that in that case an additional track was laid in the center of a street, making a double track in a sixty-foot street, and the same was not disturbed by the Indiana courts. This case has been reviewed by us before (ante p. 74) where it has been shown that this was a question of damages between the railway company and the abutting property owner, and involved no question of police or legislative power of the city, nor, as the supreme court of Indiana says in its opinion in this case (rec. 57) "was any question as to the width of the street or the degree of interference with its use or the sufficiency of the unoccupied portion for the usual purposes of a street either presented or decided."

People of the State of Michigan ex rel Kunze v. Fort Wayne & Elmwood R. R. Co., 16 L. R. A. 752, also cited (brief 78), was a proceeding in the nature of a quo warranto to prevent the railway company from occupying a certain street in the city of Detroit and to which the city was not a party and the question of the police power of the city was not an issue in the case. The conclusion arrived at by the court in the case was based upon the evidence in the case which showed in detail the character, use and environment of the street, whereas, in the case at bar this court is without any data with reference to Division Street except that same is eighty-two and one-half feet wide. It is to be noted even in that case there was a dissenting opinion, a bare majority sustaining the opinion of the court.

Counsel here (brief 79) state that the repealing ordinance is void, particularly under the decision of Town of New Castle v. Lake Erie Co., 155 Ind. 18. We again direct the court's attention to the fact that this decision merely held that the railway company had gained a prescriptive right in the street and that the question of police power was not involved in the case.

On page 80 of its brief, plaintiff in error refers to Baltimore v. Baltimore Trust Co., 166 U. S., 673, and say that we may cite that case; and then continue, "Observe, however, that in that case there was a reservation of power to enforce, amend or repeal, and the original contract was entered into subject to the right of the city to adopt such regulation." This same point was made by plaintiff in error in its brief upon the petition for rehearing and in answer the supreme court of Indiana states that neither the statute of the state nor the ordinance in that case retained the right to

amend, modify or repeal the ordinance. It appears in that case that the ordinance was ratified after its passage by an act of the legislature which provided that "the said mayor and city council shall have the same power and control hereafter with reference to the enforcement, amendment or repeal of said ordinance as it has or would have in respect to any ordinance passed under its general powers." There was no general statute authorizing amendment or repealing, and there was no right to repeal reserved in the ordinance itself, and this clause was no more than the statement of the common law, so far as the police power was involved. It was not urged by counsel in that case that there was any reserve right of repeal in the ordinance or under any statute, and the case is not predicted upon any reserve right of repeal. (Rec. 58.)

City Ry. Co. v. Citizens St. Ry. Co., 166 U. S., 557 (brief 81) was a suit between an occupying railway company in the city of Indianapolis and another company which had been granted a franchise to construct a line on the same streets, as well as other streets in that city. The case turned upon the point as to whether the occupying company had a valid franchise for its continued occupancy. This question was decided in the affirmative and no question of police power was involved in the case.

In conclusion: Plaintiff in error, both in its amended complaint and in its brief, lays particular stress on the statement that its railway system is being completely double tracked and that the proposed second track on Division Street between Michigan Street and General Taylor Street, if constructed, will become an integral part of the double track system, and therefore

it is peculiarly essential and vital to the company's interests to be permitted to lay same and highly inequitable to deny it the privilege.

We wish to leave this observation as our final proposition in this argument: That even if the railway company were conceded all the franchise rights claimed in Division Street, even then it would be wholly without double track rights in the City of South Bend west of General Taylor Street. The amended complaint affirmatively shows that the railway company never had or claimed to have any double track franchise rights west of General Taylor Street, and therefore it must have known when it set out upon the scheme of double-tracking its entire system that the operation of its entire system would have to be adjusted to single track operation in the western part of the City of South Bend, and it knows now that if its contention should prevail in this action and the additional track be laid and the double track completed from the bridge to General Taylor Street, still, its system would have to be adjusted to single track operation west of General Taylor Street. In view of the fact that the railway company would, in any event, have to adjust its system to single track operation through the western part of the city, can it be said that it was an unreasonable exercise of the police power, for the city, in order to protect the lives and property of its people, and to a degree at least preserve the street for its primary use—public travel, to compel the railway company to maintain single track operation east of General Taylor Street for a few blocks. The prevention of the construction of *double* track grade crossings at intersecting streets was alone a sufficient justification for the enactment of

this ordinance if it were necessary to justify its enactment by assigning reasons here.

Notwithstanding all our effort at brevity in writing this brief, we are conscious of the fact that it has grown upon us to an undue length.

Believing, as we do, that the adoption of the repealing ordinance of 1901 by the City of South Bend was a valid exercise of its police power, we respectfully ask that the judgment of the supreme court of the State of Indiana be affirmed.

Respectfully submitted,

IDEN S. ROMIG,
HARRY R. WAIR,
Attorneys for Defendant in Error.

11

Office Supreme Court, U. S.
FILED.
DEC 11 1912
JAMES H. McKENNEY,
CLERK.

No. 81.

GRAND TRUNK WESTERN RAILWAY CO.,
PLAINTIFF IN ERROR,

vs.

CITY OF SOUTH BEND.

Ordinance No. 62.

An Ordinance Authorizing the Peninsular Railroad Company of Indiana to Construct a Track Through the City of South Bend, and Prescribing the Terms and Conditions of Such Grant, and also Prescribing the Rate of Speed of Locomotives Through said City, and Regulating the Running of Trains Through said City by Railroad Companies, and Providing for the Punishment of Persons Interfering with the Running of Such Trains or Other Property of Railroad Companies, and for the Regulation of Runners for Public Houses at the Depots of Railroads in said City.

SECTION 1. Be it ordained by the common council of the city of South Bend, that the Peninsular Railroad Company of Indiana, be, and the said company is hereby authorized to construct and maintain a track for said railroad within the city of South Bend upon the following route, to wit: Commencing at the eastern limit of said city, on the east end of the twenty-foot street laid out and dedicated on the south side of Samuel L. Cottrell's addition to the town

of Lowell, now embraced within the city of South Bend, or at any point on said twenty-foot street that the company see proper to adopt, thence across the St. Joseph River to the eastern end of the extension of Division street, and its extension in said city so far west as said company may desire crossing all intermediate streets and alleys, and to run upon said road, locomotives, cars, and trains as may be necessary for the conducting of business of said company.

SEC. 2. The right of said company so to locate their road through the city of South Bend as aforesaid, is subject to the conditions and terms following, to wit:

First. This grant shall not be construed to interfere with the private rights of the owners of real estate over which said road may be located relative to damages for such occupancy and appropriation thereof, but is made subject thereto.

Second. When said road crosses any street or alley, it shall be made to conform strictly to the grade of such street or alley as heretofore established by the city authorities, unless the common council, upon the application of said company, shall, by resolution of said council, consent to a variation of said grade.

Third. At the crossing of streets and alleys, said company shall lay such tracks in such manner that it shall cause as little obstruction as possible to the use of such streets and alleys for the passage of wagons and other vehicles, and shall plank said track between the rails and within at least six feet on each side of said rails at all such crossings the entire width of said street or alley, and shall also plank or gravel the sidewalks where they may cross said railroad, and shall also make said crossings safe and convenient for the passage of persons and vehicles, and said company shall keep said crossings when so made in good repair and convenience so long as it shall use said streets and alleys for the purpose aforesaid.

Fourth. Said company shall construct and continually keep in repair, under and on the line of said road at such

points as may be deemed necessary by the city engineer, sufficient culverts and drains to admit of the free passage of water along the streets and alleys which may be, by the construction of said railroad, in any manner affected.

Fifth. All acts and things above required to be done by said company shall be done immediately after the grading of the track across such streets, alleys or sidewalks, and in case the said company shall fail to put such crossing in the order above required, or to keep the same in repair, or to construct and keep in repair such culverts and drains, the same shall be done by the Street Commissioner, by and under the directions of said common council, and said city may collect the cost of same, twenty per cent damages in addition thereto, by suit against said company before the mayor or city judge of said city, or any other court having competent jurisdiction.

Sixth. Said company shall not permit any car or locomotive to stand at the crossings of any street or alley so as to obstruct the free passage of teams, vehicles or persons without danger or inconvenience, and the said company, in all cases when a train is going out or coming in shall ring the engine bell so as to give notice of their arrival or departure; nor shall said company run any locomotive or car on said railroad at a faster rate than five miles per hour between Chapin and Michigan streets within the present or future limits of this city, under a penalty of ten ($10.00) dollars for each offense of each description as herein stated; to be collected by suit against said company, or by prosecution of the person causing such obstruction or having charge of such locomotive at the option of the city council.

SEC. 3. No more than one track for said road shall be laid across any street of said city without the previous assent of the common council of this city, excepting only the privilege which is hereby granted, to lay a double track over the bridge across the St. Joseph River, and from the western terminus of said bridge to General Taylor street, in said city,

subject to the conditions hereinbefore contained, and subject to the provision that said company shall and will indemnify and hold harmless the said city from all damages and costs from and on account of the bridging the St. Joseph River within the jurisdiction of said city.

Sec. 4. Said company shall, at all times when hereinafter required, by resolution of this council, maintain and keep flag stations and employ flagmen at the crossings of the main streets of said city at the expense of said company.

Sec. 5. The privileges hereinbefore granted to the railroad company are subject to the further condition that the common council of the city shall have the power at all times to regulate and control the speed and all other materials connected with the running of all railroad cars within the bounds of the city as public safety and convenience may seem to require, not, however, reducing the speed below four miles per hour.

Sec. 6. It is hereby declared to be unlawful for any of the officers, agents or servants of any railroad company, now or hereafter to be constructed within the limits of said city, to move, propel, or cause to be moved, propelled, or drawn, any railroad car or locomotive within the corporate limits of said city at a rate of speed exceeding six miles per hour, and it is also declared to be unlawful for any of the officers, agents or servants of any railroad company as aforesaid, or other person or persons, to obstruct the free passage of any street in said city by means of any railroad car or locomotive except when the same shall be running, or in cases of accident or unavoidable delay. And any person, whether superintendent, conductor, engineer, agent or servant of any railroad company, who shall offend or violate any provisions of this ordinance, or do or cause to be done, anything declared to be unlawful in this section, on conviction thereof before the city judge or mayor of said city, shall be fined not exceeding fifty dollars. But the said city council may cause the city attorney to proceed by suit against the rail-

road company whose agent or employee so offend, and such suit against such railroad company shall not exonerate any employee of said company from prosecution by complaint and arrest, by warrant personally as in other cases of violation of ordinances by individuals.

SEC. 7. It shall be unlawful for any railroad company or any person to run any locomotive, or locomotive and car or cars on any railroad track in said city when such running of such locomotive, or locomotive and car or cars, shall interfere with the free passage of any funeral procession crossing any railroad track, or when any funeral procession may be so near such track that such running of said locomotive, or locomotive and car or cars, shall delay such funeral procession from crossing any railroad track in said city. And any railroad company and any employee of such company violating the provisions of this section shall, upon the conviction thereof, be fined for each offense not exceeding fifty dollars.

SEC. 8. Any person who shall intrude himself or herself into the cars of any railroad company which may run trains of cars into or from said city now, or hereafter to be constructed for the purpose of peddling any commodity or article of merchandise without the license of the common council, and against the rules and regulations of such company, and any person who shall loiter about the depot buildings and grounds of any railroad after being requested by the station agent of such company to leave, shall upon conviction of such offense, be fined in any sum not exceeding fifty dollars, with costs of suit.

SEC. 9. Any person who shall wantonly, mischievously, and carelessly interfere with switches, hand cars, cars or locomotives, or any other property of any railroad company within said city, or who shall without authority of law or the permission of the employees of such railroad company enter into or go upon the platform of any car of such company, to the hindrance of passengers, or the employees of

such company, in the discharge of their duties shall, for each offense upon conviction thereof be fined in any sum not exceeding fifty dollars, and costs of suit.

SEC. 10. Any person who shall in a rude, insolent or noisy manner, solicit the patronage of any passenger of any railroad company at or in the vicinity of the depot for any omnibus, carriage, hotel, inn or boarding house, or who shall solicit the same upon the platforms, landing places or depot rooms of such railroad or any other property of such railroad company, other than such places designated by the station agents of the railroad companies by printed notice exhibited by such company aside of the front of the main entrance of the passenger depot building of such company, shall, upon conviction thereof, before the mayor or city judge, be fined in any sum not exceeding fifty dollars, and the costs of the suit.

Passed March 2, 1868.

WM. G. GEORGE,
Mayor.

Attest:
JOHN HAGERTY,
City Clerk.

STATE OF INDIANA,
St. Joseph County,
City of South Bend, ss:

I, Frank Bilinski, clerk of the city of South Bend, do hereby certify that the above and foregoing is a full, true and complete copy of Ordinance No. 62, adopted March 2, 1868, by the common council of the city of South Bend, as the same is of record in this office, in Ordinance Book No. 1, at page 119.

In witness whereof I have hereunto set my hand and affixed the seal of the city of South Bend, at South Bend, in said county, on the 3d day of December, 1912.

(Signed) FRANK BILINSKI,
[SEAL.] *Clerk, City of South Bend.*

Ordinance No. 1075.

An Ordinance to Provide Against the Laying of a Double Track on Division Street, in the City of South Bend, by the Grand Trunk and Western Railway Company.

Be it ordained by the common council of the city of South Bend that so much of section three of Ordinance Number Sixty-Two (62) passed March 2, 1868, by the common council of the city of South Bend, as relates to the laying of a double track on Division street in the city of South Bend from the western terminus of the bridge over the St. Joseph River to General Taylor street in said city should be, and is hereby repealed.

SEC. 2. All ordinances or parts of ordinances giving rights, privileges and franchises to any railway company to lay a double track on Division street in said city are hereby repealed.

STATE OF INDIANA,
St. Joseph County,
City of South Bend, ss:

I, Frank Bilinski, clerk of the city of South Bend, do hereby certify that the above and foregoing is a full, true and complete copy of Ordinance No. 1075, adopted on the 14th day of October, 1901, by the common council of the city of South Bend, as the same is of record in this office, in Ordinance Book No. 4, at page 122.

In witness whereof I have hereunto set my hand and affixed the seal of the city of South Bend, at South Bend, in said county, on the 3rd day of December, A. D. 1912.

(Signed) FRANK BILINSKI,
[SEAL.] *Clerk, City of South Bend.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1912.

GRAND TRUNK WESTERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
CITY OF SOUTH BEND et al.,
Defendants in Error.

Error to the Supreme Court of the State of Indiana.

REPLY TO BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

These pages are intended to reply concisely only to the main questions of the effect and invalidity under the Constitution of the United States of the Ordinance of 1901 passed by the City of South Bend, defendant in error, purporting to repeal the portion of Ordinance No. 62 granting double track rights in that city to plaintiff in error; to distinguish the principal cases cited by defendant in error; and to clear up the vital issues in this case. Inasmuch as we shall cite but few authorities and not attempt to cover all the questions involved, we respectfully urge this Honorable court to again read our opening brief as a more complete answer to the able brief

filed for defendant in error. We shall for brevity refer to plaintiff in error as plaintiff, and defendant in error as defendant, the respective positions occupied by these parties below.

I.

ADMISSIONS OF DEFENDANT NARROWING THE ISSUES.

(a) The validity of the original ordinance, No. 62, granting plaintiff the double track rights here in controversy is admitted by defendant at page 13 of its brief in the following clear terms:

> "The validity of Ordinance No. 62 is not questioned. The naked question is: Did the City of South Bend have the power to repeal and set aside the grant of the right to lay down the additional track on Division street and Taylor street? In other words, is Ordinance No. 62 an irrepealable contract?"

This narrows the whole issue to the power of the City of South Bend to repeal that portion of Ordinance No. 62 granting to plaintiff the right "to lay down a double track across the bridge over the St. Joseph river and from the western terminus of said bridge to General Taylor street in said city." (Rec., 6, Petition [5].)

(b) Defendant also admits the "condition of the title of plaintiff (Defendant's Brief, page 21, Point XII) and the regularity of its articles of incorporation." (*Ib.*, Point XIII.)

On the same page, under Point XIV, the admission is made that the "repealing ordinance of 1901 is not based upon non-user." The question of non-user is also waived under the heading "*Seventh*"

on p. 73 of counsel's brief, and hence that point requires no further argument. This question is, however, fully covered under the heading "Seventh" on page 45 of our original brief.

All these admissions therefore leave the validity and effect of the repealing ordinance and the averments of the petition relating thereto as the only points now necessary to consider further.

II.

THIS COURT WILL DETERMINE FOR ITSELF WHETHER THE PLEADINGS PRESENT A FEDERAL QUESTION. IN THIS SUIT THE PETITION SUFFICIENTLY AVERS FACTS SHOWING THAT THE ATTEMPTED REPEALING ORDINANCE AS APPLIED TO PLAINTIFF IS NEITHER REASONABLE NOR NECESSARY, AND DISTINCTLY RAISES ITS CONSTITUTIONALITY.

That this court will determine for itself whether or not there is a Federal question actually raised by the pleadings is held in the case of *Newport Light Co.* v. *Newport*, 151 U. S., 527, 536, and cases therein cited. To the same effect are the cases cited in point *First* of our opening brief, pages 15 to 18, to which we respectfully refer your Honors.

We here quote again the pertinent allegations of the complaint, that your Honors may note how fully the averments support the contentions of plaintiff:

> "28. Plaintiff further avers that on the fourteenth day of October, 1901, the said City of South Bend through its Common Council assumed by said ordinance to repeal so much of said ordinance granting the right to maintain a railroad in said Division street as gives the right to a second track in said street, and said

city now sets up and claims that said action of its Common Council was effective in that behalf, and that thereby the plaintiff's right to said second track was lawfully revoked. Plaintiff, on the contrary, claims that said ordinance constituted a contract in its entirety as between said city and the railway company in whose behalf it was granted as aforesaid; irrepealable by said city, either in whole or in part, and that plaintiff has succeeded to all the rights of said railroad company under said contract; that said ordinance of repeal is void as violative of said contract and plaintiff's right thereunder, as being in conflict with Section 10 of Article 1 of the Constitution of the United States, and in conflict also with Section 24 of Article first of the Constitution of Indiana." (Rec., 13.)

"19. And plaintiff avers that the said Peninsula(r) Railway Company in the year of 1871, relying on the full force of the ordinance [No. 62] of defendant's city, above mentioned, did build its said railroad through St. Joseph County in the State of Indiana, and did build a single track through Division street in the City of South Bend, and in so doing did lay a single track of rails on Division street in the City of South Bend from the west end of the bridge crossing the St. Joseph river in said city, and did extend its tracks therefrom to the west side of Laurel street in said city, and that said tracks was laid in the centre of said street, and southwesterly from said Laurel street to the west side of said county, and that the said Peninsular Railway Company and its successors hereinbefore mentioned, each relying likewise on the full force of said ordinance, have ever since kept up and maintained and operated the same as a railroad, and that this plaintiff is now operating the same as a railroad, and as a part of its continuous lines." (Rec., 10.)

"26. It is furthermore apparent, and plaintiff avers the fact so to be, that the obstructing of the general public in the use of said street by passing trains will be much less when two tracks are used than it now is when all trains, both ways, have to pass over a single track, that said street is 82½ feet wide and that there is ample room thereon for general travel and for said double track." (Rec., 12.)

"27½. Said plaintiff avers that on the first day of January, A. D. 1881, said Chicago and Grand Trunk Railway Company did lay down a double track on Division street between the St. Joseph river and Michigan street and it and its said assigns have ever since used and plaintiff still uses the same." (Rec., 13.)

The prevention of the laying of this second track, granted by contract ordinance No. 62, and the threats made by defendant against plaintiff should plaintiff so proceed to do, are set forth in clause 29 of paragraphs 1 and 2 of the complaint (Rec., 13, 25), and the prayer (Rec., 26) covers full injunctive relief. It is difficult to see how the validity of this repealing ordinance could be raised more certainly or clearly. The allegations of width of street, space thereon for the double track and the general public, and acts done in reliance on the contract ordinance, are not conclusions, but averments of facts as fully as such facts are capable of averment. The rules of equity pleading do not require a setting forth of all the elemental and detailed facts to be brought out in evidence. The ultimate facts are sufficient, and these are here averred. A petition that could serve as a transcript of evidence would be a ridiculously cum-

bersome document, and to require each condition of fact pleaded as a basis for relief to be broken up into all its fundamental elements, each supported by detailed examples of proof, would be equally burdensome. Moreover, the doing of specific acts in reliance on a contract is not a conclusion, because it will not admit of further proof than the statement coupled with the condition that those acts have a reasonable relation to that contract. A *scienter*, charge of malice, or denial of notice or knowledge would be equally mere conclusions and could not be pleaded if such a theory could control.

That the plaintiff relied on this contract and acted thereon consistently is shown by the following further averments of the petition:

In paragraph 2, record 21, the petition avers and the demurrers admit as follows:

> "18. * * * And plaintiff avers that when it so acquired title to said railroad" (the railroad of the predecessor of plaintiff in error) "and took possession thereof it supposed and believed that * * * the ordinance hereinbefore mentioned enacted by the City of South Bend gave to the said Peninsular Railroad Company" (the predecessor of plaintiff in error) "the right to lay down a double track through said portion of Division street in the City of South Bend, between the bridge over the St. Joseph river in South Bend and Taylor street in said city and was valid * * * and under such supposition and belief and in good faith did proceed to lay down and complete a double track on its railroad along a large portion of its line, and at the time of the commencement of this action had expended in the construction of said double track over a million dollars. * * *"

Rec., 22, 23:

"20. * * * that in the year 1881 the said Chicago and Grand Trunk Railway Company" (predecessor of plaintiff in error), "which company was then operating and maintaining said railroad, desired to acquire and perfect its title to the land used by it, and which it would be necessary to use in operating its road, as a right of way through Division street in said city, * * * and relying on the validity of said franchise and right of way to occupy said street, so granted by the said Common Council of the City of South Bend, on March 2, 1868, did, in accordance with the statutes of the State of Indiana, appropriate for its use as and for a railroad track a strip of land eighteen (18) feet wide from north to south, extending from east to west along the centre of Division street, from a point ten (10) rods, seven and one-half (7½) feet east of the east line of Michigan street in said city to General Taylor street. * * * And did in order to acquire and perfect its title to the said eighteen feet of land, so that it could lay down a double track thereon, institute proceedings for appropriation in the St. Joseph Circuit Court, and cause the interest of the owners in the fee of said land so taken and appropriated to be duly appraised and did pay to the various owners of said interest a full appraised value thereof; * * * and that the making of said appropriation and the purchase of said strip of land eighteen (18) feet wide were matters of public notoriety, and it was well known to the City of South Bend and the inhabitants thereof that the Chicago and Grand Trunk Railway Company was making such appropriation and condemnation of land * * * which it so intended to use for a double track and no objection whatever was made by the said City of South Bend to said acts of appropriation."

Rec., 23:

> "21. And the plaintiff further avers that it also appropriated for its right of way over eighteen feet in width from a point ten rods, seven and one-half feet east of the east line of Michigan street to the bridge crossing the St. Joseph river, and paid for the same the sum of seven thousand dollars. * * *
>
> "23. And plaintiff avers that since the year 1871, this company and predecessors aforesaid have openly, continuously and notoriously occupied the centre of Division street with its said railroad from the west end of said bridge to Taylor street, and have always claimed the right to lay down said double track across the St. Joseph river and along said Division street from the west end of said bridge to the centre of General Taylor street aforesaid whenever the requirements of their business should make it necessary, and have expended large sums of money in the maintenance of said track and have complied with the conditions required of them by said ordinance with the full knowledge and acquiescence of the City of South Bend and the authorities thereof."

It is further averred, Section 24, Record, 23, that the grant in said ordinance of a right to a second track was intended for the accommodation of the railroad when its business should require a double track; that that condition has arrived and that the railroad was then double tracking its entire line and had already completed the work of laying a second track for upwards of 157 miles of said road.

The petition continues (Rec., 24):

> "27. Plaintiff avers that at various and frequent times between the time of first building said existing track through Division street un-

til the present time the said City of South Bend had ratified and confirmed said ordinance granted as aforesaid to said Peninsular Railroad Company by requiring this plaintiff and its several predecessors aforesaid and especially this plaintiff and said Chicago and Grand Trunk Railway Company to spend money in the changing of the grade of said track, in the planking and grading the same in the manner specified by said ordinance and even in a manner more expensive than so specified, also in lighting and watching crossings of plaintiff's said track with various streets in said city. All of said requirements were complied with, and said Chicago and Grand Trunk Railway Company spent large sums of money in so doing, to-wit, the sum of $5,000. And said plaintiff spent and must continue to spend large sums of money in so doing, to-wit, the sum of $3,000 annually, and in so doing relied on the position assumed by said city that said ordinance was in its entirety a valid and existing grant and that the same was so taken and treated by said city and that said city would not attempt to rescind said ordinance or any portion thereof.

"And plaintiff avers that by reason of the facts aforesaid the said City of South Bend is and should be stopped from * * * claiming or asserting that the plaintiff as assignee and successor of the first named Peninsular Railroad Company has not the right to lay down said double track in the portion of Division street hereinbefore mentioned."

Similar averments occur in the first paragraph of the petition, Sections 20 to 27½ (Rec., pp. 10 to 13).

III.

THE GRANT OF THIS RIGHT OF WAY FOR A DOUBLE TRACK BY ORDINANCE 62, TO THE PLAINTIFF, IS AN EASEMENT PROTECTED BY THE FEDERAL CONSTITUTION FROM DESTRUCTION.

We quote again the case of *Mayor, etc., of Knoxville* v. *Africa*, 77 Fed., 501, at 507 (cited in our original brief at p. 64), wherein Mr. Justice Lurton held:

> "A right of way upon a public street, whether granted by act of the Legislature or ordinance of City Council or in any other valid mode, is an easement, and as such is a property right, capable of assignment, sale and mortgage, and entitled to all the constitutional protection afforded other property rights and contracts."

We might add that such a grant is held to be an easement in the very case cited by counsel for defendants (*Indianapolis & Cincinnati R. R. Co.* v. *State ex rel. City of Lawrenceburg*, 37 Ind., 489, at 494), in their brief at page 45. That such a grant, when acted upon as here, in the manner shown by the averments of the petition, quoted under the preceding point, is protected from violation under the Indiana decisions themselves, we have shown in our original brief under Point Sixth, beginning at page 37.

We here again repeat, that expenditures and acts, made and done with the knowledge of the municipality on the faith of an ordinance passed by the latter giving consent to the occupying of its street, as here, for railroad purposes, make such an ordinance, even if viewed as a license only, irrevocable,

as held in the *Town of Newcastle* v. *Lake Erie & W. R. Co.* (quoted in our original Brief), 155 Ind., 18, at page 26, in the following express terms, uttered in adjudging a similar consent upon similar facts:

> "But property that a municipality has the power to convey may be acquired from it by prescription. *City of Bedford* v. *Willard*, 133 Ind., 562; 33 N. E., 368; 36 Am. St. Rep., 563, and note. In *Jorgenson* v. *Squires*, 144 N. Y., 280; 39 N. E., 373, and in *People* v. *Collis* (Sup.), 45 N. Y. Supp., 282, it was held that, the Legislature having authorized municipalities to grant property owners the right to build and maintain certain structures in the streets, the continued used of such a structure for more than twenty years, with the knowledge and acquiescence of the municipality, raised the conclusive presumption of a grant. *If the grant in this case be considered in the nature of a mere license, it has become irrevocable by reason of appellees' expenditures with the knowledge of appellant.* *Buchanan* v. *Railroad Co.*, 71 Ind., 265; *Joseph* v. *Wild*, 146 Ind., 249; 45 N. E., 467; and cases there collated."

This ordinance, granting an easement upon conditions named, became, when acted upon as shown by the petition, an executed contract. This contract is protected by the contract clause of the Constitution of the United States, and as it cannot be abrogated by the state, so it cannot be revoked by this municipality. Moreover, the equity is particularly strong in the present instance, inasmuch as the City of South Bend has silently stood by allowing the plaintiff to acquire right of way, make expenditures and extend its double track over its whole system, only to interfere with the laying down of

this double track when the business of the road and the work of laying the double track had arrived at a point where it was necessary to complete that portion lying in the City of South Bend.

This is averred in the petition, and admitted by the demurrer, as follows:

> "27½. And plaintiff avers that the said city knew of each and every of the purchases aforesaid and each and every of the expenditures made by this plaintiff and its assignors and predecessors in title and that they were made upon the faith of the validity of the ordinance grant, and that the city remained quiet and omitted to make known to the company any intention to avoid any portion of the ordinance or weaken it in any way in its entirety, but allowed all of said purchases and consolidations to be made and allowed the plaintiff and its said assignors and predecessors in title to spend the said $1,000,000 and other sums of money upon the understanding that the said ordinance was valid in every respect and would be kept and performed by the city, and that if now the said City of South Bend should succeed in rescinding so much as pertains to a double track, it would cast upon the plaintiff not only a great financial loss in requiring it to operate the same in a more expensive manner than the ordinance provides, but will cause great and irreparable money loss [in] increase (of) expenses of operation and in the delay of its trains, the one waiting for another, and that it will, to a large extent, cripple the capacity of double track portion of its road by compelling the plaintiff to operate this section of its road upon single track methods, and such action on the part of this city will be inequitable in view of the facts, and that the city should be stopped from taking such action." (Par. 2; Rec., 25.)

IV.

THE CITY IS NOT THE SOLE JUDGE OF THE REASONABLENESS OF AN ORDINANCE THAT AFFECTS OR DESTROYS THE USE OF PROPERTY. THIS IS A JUDICIAL QUESTION WITHIN THE JURISDICTION OF THE COURTS.

We desire to add to our discussion of this subject under Point 10, page 65, of our original brief, the following excerpts from Freund on the Police Power, edition 1904.

The learned author makes the following statement at page 29:

> "Sec. 33. REGULATION BY MUNICIPAL AUTHORITY. It is generally held that a positive limitation by municipal authority is not conclusive, but may be shown to be unreasonable. The courts have especially refused to recognize in a number of cases territorial limitations for offensive establishments and employments." (Citing *Bessemer* v. *Indianapolis*, 71 Ind., 189.)

Later follows a learned and clear exposition of the doctrine here contended for, namely, the requirement of reasonableness in an ordinance, and the power and duty of courts to examine this question. Mr. Freund lays down the doctrine as follows (beginning at p. 57):

> "Sec. 63. It is a well established principle that municipal police ordinances, like all other municipal ordinances, must be reasonable in order to be lawful. (Citing Dillon Municipal Corporations, Sec. 319.)
>
> "The Supreme Court of the United States has declared it to be an ancient jurisdiction of judicial tribunals to pronounce upon the reasonableness and consequent validity of the by-laws of inferior municipal bodies. (*Yick Wo* v.

Hopkins, 118 U. S., 356, 1886), the 'inferior municipal body' in the case cited being the Board of Supervisors of the County of San Francisco. It is possible to say that there is implied in every delegation of power to a municipal corporation a condition that the power must be exercised reasonably, and that therefore every unreasonable ordinance is *ultra vires*, and the court, in treating it as null and void merely enforced the legislative will and principles of policy embodied in it.

"If the courts undertake to declare a statute void on the ground that it is unreasonable, they must assume the existence of a standard of reasonableness which is above legislative policy. Do our constitutions embody such a standard of reasonableness?

"In discussing this question we may safely discard all arguments drawn from the assumption that unreasonable means absurd or plainly arbitrary; statutes which deserve that designation are not much more apt to occur than judicial decisions of the like character.

"If on the other hand reasonable is understood to mean well adapted to the end in view, there is practically no judicial claim to control the judgment of the Legislature of what is reasonable. The courts are certainly emphatic in their assertion that they have nothing to do with the wisdom or expediency of legislative measures.

"The question of judicial power practically confines itself to a third meaning of reasonableness, namely, moderation and proportionateness of means to ends. The earlier attitude of the courts seems to have been that if it was acknowledged that a condition existed for legislative action, the Legislature was sole and conclusive judge (under specific constitutional limitations) to what degree its power should be exercised. So it was said in *Brown* v. *Maryland:*

" 'Questions of power do not depend upon the degree to which it may be exercised. If it may be e[illegible]sed at all, it must be exercised at the will o[illegible] those in whose hands it is placed.' This decision related to the taxing power; but similar expressions are used with reference to the police power. So in the matter of regulation of charges: 'We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by Legislatures the people must resort to the polls, not to the courts.' (Citing *Munn* v. *Illinois*, 94 U. S., 113.)

* * *

"As a rule, however, at the present day, an unlimited extent of legislative power in this direction is assumed only for purposes of argument, a moderate exercise of power being held void on the ground that if conceded it might be carried to excessive lengths. So in the case in which the flag legislation of Illinois was declared unconstitutional, one of the arguments relied upon by the court was that if the Legislature might prohibit the use of the flag for one purpose, it might forbid it for all purposes. (Citing *Ruhstrat* v. *People*, 185 Ill., 133; 49 L. R. A., 181; 57 N. E., 41), an argument which loses all force if the courts control the degree to which a power may be exercised.

"The Supreme Court of Illinois had asserted the right to control the proportionateness of means to ends very strongly, when in annulling an ordinance requiring railroad companies to keep flagmen at every railroad crossing, it said that it would treat the question as if the city had all the powers which the state has for the welfare of the people, implying that a similar statute would have been declared void for unreasonableness. (*Toledo, etc., R. Co.* v. *Jacksonville*, 67 Ill., 37.)

"Other leading courts have stated very dis-

tinctly that reasonableness is one of the inherent limitations of the police power; so the Supreme Court of Massachusetts: 'Difference of degree is one of the distinctions by which the right of the Legislature to exercise the police power must be determined. Some *small* limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil. *Larger ones could not be without the exercise of the right of eminent domain,*' (*Rideout* v. *Knox,* 148 Mass., 368) and the Supreme Court of the United States: 'A statute or a regulation provided for therein, is frequently valid, or the reverse, according as the fact may be, whether it is a reasonable or an unreasonable exercise of legislative power over the subject matter involved, and in many cases questions of degree are the controlling ones by which to determine the validity, or the reverse, of legislative action,' (*Wisconsin M. & P. R. R. Co.* v. *Jacobson,* 179 U. S., 287, 1900) and in *Plessey* v. *Ferguson,* 163 U. S., 537, in answer to the contention that the principle of separation might be carried to the length of assigning to black and white different quarters of the city for living or different sides of the street for walking, the Supreme Court said: 'The reply to all this is, that every exercise of the police power must be reasonable.' And in the matter of the regulation of charges, the Supreme Court has entirely abandoned the attitude expressed in *Munn* v. *Illinois* that the remedy for an abuse of the power must be sought at the polls and not in the courts. After declaring in the railroad commission cases (116 U. S., 307) that the power to regulate is not a power to destroy, the court in *Reagan* v. *Farmer's Loan & Trust Co.* (154 U. S., 362) said distinctly: 'There can be no doubt of the power and duty (of the courts) to inquire whether a body of rates imposed by a Legislature or a commission is unjust and un-

reasonable, and such as to work a practical destruction of rights of property, and if found so to be, to restrain its operation.' In *Covington, etc., Turnpike Road* v. *Sandford* (164 U. S., 578) the power of the court to inquire into the reasonableness of a legislative rate was regarded as established beyond question, and in *Lake Shore and Michigan Southern R. R. Co.* v. *Smith* (173 U. S., 684) a rate fixed by statute was held to be unconstitutional.

"*Effective judicial limitations of the police power would be impossible, if the Legislature were the sole judge of the necessity of the measures it enacted.* The only question a court could then ask in dealing with police legislation would be: Does a condition exist which justifies any legislative action? But the maintenance of private rights under the requirements of the public welfare is a question of proportionateness of measures entirely. *Liberty and property yield to the police power, but not to the point of destruction.* While an excessive degree of impairment would as a rule be contrary to legislative as well as to constitutional policy, the history of the regulation of railroad charges has shown that the question of the indirect and perhaps unintended destruction of private right may become an important and extremely difficult issue for determination. *In reserving the conclusive determination of this issue to themselves, the courts have firmly established the principle that the duty of the reasonable exercise of the police power is a constitutional limitation upon the Legislature. There are few forms of control that cannot become unreasonable by an excess of degree; and there are many cases where no other principle of limitation is discoverable than that of reasonableness,* as in legislation fixing hours of labor, or requiring improvements or arrangements for public convenience on the part of public service companies.

> *"The question of reasonableness usually resolves itself into this: Is regulation carried to the point where it becomes prohibition, destruction, or confiscation?"* (Italics are ours.)

For this ordinance attempting to deprive plaintiff of its contract right to lay down a second track on the right of way acquired for that particular purpose, and to take from plaintiff the easement acquired therefor under contract, Ordinance No. 62, no necessity of any kind has been shown. On the other hand, the petition has set forth fully and clearly the necessity arising in the course of plaintiff's business as a common carrier between states to lay down that second track in order to properly carry on its public calling. (Rec., 13. See original Brief, pp. 75-79.)

The petition shows further the ample width of the street (82½ feet), and its sufficiency for public travel and the double tracks of plaintiff. (Rec., 12.)

We submit that these averments more than overcome any possible presumption of reasonableness attaching to the mere passage of the ordinance, and that the above authorities and the clear reasoning therein contained lay upon this court the duty of investigating for itself and ascertaining the reasonableness and public necessity of this ordinance on the facts alleged, independent of the action of the municipality.

This court has never declared that a city could deprive a railroad of the right, once granted, to use its tracks and right of way for public carriage in the streets of a city, unless when necessity be shown, amounting to actual danger to the traveling public, on facts actually proven. As more fully set forth in

our original brief, page 80, the case of *Baltimore* v. *Baltimore Trust Co.*, 166 U. S., 673, so much relied upon by counsel for ~~complainants~~ defendants, was decided upon the express ground that the street occupied by the railroad was *very narrow, and using it for a double track was substantially depriving the people of a right of passage and creating actual danger* (pp. 683, 684). Moreover there was an express power to amend, alter and appeal reserved.

There is no averment or showing of any kind in the present case on which any reasonableness of or necessity for this revoking ordinance can be rested. On the contrary the facts showing its unreasonable and arbitrary character are set forth in the petition and admitted by the demurrer. (Rec., 12; original Brief, pp. 75-79.)

To allow the municipality to revoke the right to lay down additional tracks once given, on its arbitrary whim, without actual and stern necessity shown therefor, in these days of increasing through traffic over the great arteries of commerce between states, a traffic that has grown to such an extent that it is now one of the vital questions of the country, would mean that no railroad can safely proceed on grants once obtained from the various municipalities, through which it runs, to lay down a double track system, for fear of finding itself blocked the moment it comes to the threshhold of any one such municipality. Further, to allow such a doctrine to once obtain a foothold would mean, under the theory invoked, that even a single track could not safely be laid down, for without any showing of menace or danger an ordinance granting such a right could be

revoked at any time before the carrier in the course of its construction might arrive at the limits of the particular city. On the theory contended for by counsel, even a single track, already laid and a means of commerce, could be removed, as the city is the sole judge of the necessity, in support of which it need allege no facts, and the public safety is considered involved by the mere presumption in favor of rational action on the part of any municipal council.

We do not believe that this court will thus sanction the arbitrary blocking of interstate commerce.

As shown in our original brief, page 27, the franchise to operate through and over city streets, is granted by the state, conditioned only on the consent of the city. To allow the city to revoke that consent is to allow it to revoke the franchise granted by the state, for the consent once given makes operative the franchise, and the revocation of that consent would make the franchise futile.

We should like to add two cases to those cited in our original brief on this point.

In *The City of Clinton* v. *Clinton & Lyons Horse Ry. Co.*, 37 Iowa, 61, an injunction was refused to the City of Clinton, which latter sought to prevent the railway company from putting down rails in its streets after a contract ordinance granting the right to put down such rails had been partly acted upon and thereafter revoked. The statutes in that state gave the city, as here, the power to consent to the laying down of tracks on its streets.

Des Moines City R. Co. v. *Des Moines*, 151 Fed., 854, involved the following facts:

In 1866 the City of Des Moines passed an ordinance granting to a street railway company and its successors and assigns the right to lay tracks in any of the streets of the city, and to "operate thereon cars in the manner and for the time and upon the conditions hereinafter mentioned and prescribed." A subsequent section provided that the right granted "shall be exclusive for the term of thirty years," and that the city should not, "until after the expiration of said term, grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company." At that time there was no statute of the State of Iowa specifically conferring on cities the power to grant franchises to street railroad companies, but such grants were afterward legalized by the Legislature, and there is no statute limiting the term for which such grants may be made. At all times until the year 1905 the city in many ways recognized the franchise as in force, and after the expiration of the thirty-year term required complainant, which had succeeded to the property and franchise of the original company to pave streets, and construct new lines at large expense. In 1905 the City Council passed a resolution treating complainant as a trespasser, and ordering all of its seventy miles of tracks removed from the streets. Held, that the ordinance granted a franchise in perpetuity, its exclusive character only being terminated at the end of the thirty years, and created a contract which the city could not impair; that complainant was entitled to an injunction restraining the enforcement of the resolution on that ground, and also

on the further ground that the city was estopped by its acts from insisting upon a different construction of the contract.

In our original brief, beginning at page 72, we have seen how the city, defendant below, not merely stood silent while plaintiff expended large moneys and acted in other ways on the faith of the validity and continuance of the double track right granted by Ordinance No. 62, but actually required large expenditures of plaintiff under that ordinance (pp. 9, 12, *supra*). This brings the instant suit within the clear terms of the decision just cited.

V.

BRIEF DISTINCTION OF CASES CITED BY COUNSEL FOR DEFENDANT.

The cases cited by counsel relating to the power of the city to pass the attempted repealing ordinance or cited to show the inability of the city to grant contract ordinance No. 62, fall into two classes: The one relates purely to matters of regulation and nowhere involves the taking of property or its use once granted, nor the infringement of a contract ordinance relating to the right of the property. To say, as those cases declare, that the city has the power to regulate the grade of its streets and to require the railroad company to conform to that grade, regardless of any agreement between the company and the city as to another and different grade, or means of maintaining the same, is not to take from a railroad a right of property, but merely to make that railroad conform its use of that property to the con-

venience of the traveling public passing over the same highway. There can be no analogy between saying to a railroad, "You shall make your tracks conform to the level of the highway, no matter how that level may be ascertained or determined from time to time," and taking from that railroad the right to pass over the highway once that right has been granted. It is the same way with cases relating to fencing, speed, signals, gates and all matters of pure regulation.

We contend that the cases involving these questions, so constantly cited throughout the able brief of counsel, are not to the point.

On page 58 of counsel's brief, many cases are cited to show that "the protection of the lives and property of citizens is the highest object for which legislation can be invoked. Police power has been asserted for objects of much less importance." Among all those cases, there is none that does more than regulate a particular business, save several that abolish pursuits determined to be contrary to public policy. Whenever interstate commerce becomes contrary to public policy those last cases may be in point.

The second class of cases cited throughout counsel's brief on the alleged validity of the attempted repealing ordinance consists of those decisions in which a contract ordinance involving a property right was actually repealed and the repeal upheld. Of these, there are only three by a court of last resort even remotely affecting the present question and cited by counsel. *East St. Louis Ry. Co.* v. *East St. Louis*, 55 N. E., 533 (Supreme Court of Illinois), re-

lated to an ordinance revoked before any action thereon had been taken, with the offer on the part of the city to the railroad company to even return the sum of $300 paid to the city treasurer in consideration of the passage of the ordinance. *Snouffer v. Cedar Rapids & M. City Ry. Co.*, 92 N. W., 79, while apparently dealing with the revocation of an ordinance, involves only the question involved in the other cases cited by counsel relating to changes of grade or position to be occupied by the railway along a city street, and does not involve the power of the city to revoke a right once granted to the railway company to put down its tracks in that street.

The third case is *Baltimore* v. *Baltimore, etc., Co.*, already discussed (page 19, *supra*), and shown to be decided on proof of actual public menace and danger, revealed in clear evidence.

These cases are plainly far removed from the present instance in which the question is presented of an ordinance contract accepted and so far acted upon that large moneys were expended, the railway system double-tracked up to the city, and right of way for all double track within the city granted by Ordinance 62 acquired on the faith of the ordinance; while no necessity for the passage of the ordinance is shown on the face thereof, or in the record, as against the clear averments in the petition rebutting any possibility of such reasonableness or necessity.

In conclusion we respectfully request this honorable court to re-read our original brief at p. 79, on the scope of this attempted repealing ordinance, and more especially Points VIII to XI, beginning at page 60, inasmuch as we believe a complete answer will

be found in those pages to the strongest contentions of counsel to be found in their argument in favor of the validity of the attempted repealing ordinance. That this ordinance is null and void as to plaintiff, as arbitrary and unreasonable; that it attempts to deprive plaintiff of its property without due process of law, contrary to Amendment XIV to the Constitution of the United States; and that it infringes the contract right of plaintiff lawfully entered into and acted upon by the latter, in violation of the contract clause of that Constitution, is, we respectfully contend, established by the authorities and reasoning set forth above.

Respectfully submitted.

G. W. KRETZINGER.